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Legislative History – Montana Session Law

Chapter: 87 Session L: 1987

Bill Number: SB 16

Checklist of Bill History

History and Final Status Sheet	☑
Introduced Bill	☑
Fiscal Note	☐
Third Reading Bill	☐
Final Version of Bill	☐

House	Senate
Committee: Business & Labor	Committee: Judiciary
Hearing Date(s): 3/3/1987	Hearing Date(s): 1/16/1987
Committee Report: 3/3/1987	Committee Report: 1/19/1987

Conference Committee

Hearing Date(s):

Conference Committee Report:

Compiler Notes

Compiled by: SK Marshall

Date: 12/26/2024

Notes: Audio/Video recordings can be found here:
https://sg001-harmony.sliq.net/00309/Harmony/en

Thank you!

SENATE FINAL STATUS

3/13 HEARING
3/13 COMMITTEE REPORT--BILL CONCURRED
3/16 2ND READING CONCURRED
3/17 3RD READING CONCURRED

RETURNED TO SENATE
3/20 SIGNED BY PRESIDENT
3/21 SIGNED BY SPEAKER
CHAPTER NUMBER 218 EFFECTIVE DATE; 1/
CONTINGENT ON VOTER APPR

SB 15 INTRODUCED BY NEUMAN
EXEMPT BOARD OF INVESTMENTS STAFF POSITIONS FR
EMPLOYEE CLASSIFICATION

1/05 INTRODUCED
1/05 REFERRED TO STATE ADMINISTRATION
1/06 FISCAL NOTE REQUESTED
1/07 FISCAL NOTE RECEIVED
2/13 HEARING
2/13 TABLED IN COMMITTEE

SB 16 INTRODUCED BY HALLIGAN
REQUIRE PRESALE NOTICE TO OWNER OF SALE TO ENF
AN AGISTER'S LIEN OR LIEN FOR SERVICE
BY REQUEST OF JOINT INTERIM SUBCOMMITTEE ON
LIEN LAWS

1/05 INTRODUCED
1/05 REFERRED TO JUDICIARY
1/16 HEARING
1/21 COMMITTEE REPORT--BILL PASSED AS AMENDEI
1/24 2ND READING PASSED
1/27 3RD READING PASSED

TRANSMITTED TO HOUSE
2/04 REFERRED TO BUSINESS & LABOR
3/03 HEARING
3/03 COMMITTEE REPORT--BILL CONCURRED
3/04 2ND READING CONCURRED
3/05 3RD READING CONCURRED

RETURNED TO SENATE
3/10 SIGNED BY PRESIDENT
3/11 SIGNED BY SPEAKER

3/11 TRANSMITTED TO GOVERNOR
3/16 SIGNED BY GOVERNOR
CHAPTER NUMBER 87 EFFECTIVE DATE: 10/(

SB 17 INTRODUCED BY PINSONEAULT
REQUIRING APPOINTMENT OF AN INDIAN CHILD WELFAI
SPECIALIST
BY REQUEST OF COMMITTEE ON INDIAN AFFAIRS

1/05 INTRODUCED

SENATE BILL NO. 16

INTRODUCED BY HALLIGAN

BY REQUEST OF THE INTERIM SUBCOMMITTEE ON LIEN LAWS

IN THE SENATE

JANUARY 5, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
JANUARY 21, 1987	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
JANUARY 22, 1987	PRINTING REPORT.
JANUARY 24, 1987	SECOND READING, DO PASS.
JANUARY 26, 1987	ENGROSSING REPORT.
JANUARY 27, 1987	THIRD READING, PASSED.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 4, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON BUSINESS & LABOR.
MARCH 3, 1987	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
MARCH 4, 1987	SECOND READING, CONCURRED IN.
MARCH 5, 1987	THIRD READING, CONCURRED IN. AYES, 90; NOES, 8.
	RETURNED TO SENATE.

IN THE SENATE

MARCH 6, 1987	RECEIVED FROM HOUSE.
	SENT TO ENROLLING.

SENATE BILL NO. 16

INTRODUCED BY HALLIGAN

BY REQUEST OF THE INTERIM SUBCOMMITTEE ON LIEN LAWS

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING NOTICE TO THE OWNER OR PERSON WHO CONTRACTED FOR THE SERVICES OR MATERIALS PRIOR TO A SHERIFF'S SALE OF PROPERTY SOLD TO ENFORCE AN AGISTER'S LIEN OR LIEN FOR SERVICES; AND AMENDING SECTION 71-3-1203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 71-3-1203, MCA, is amended to read:

"71-3-1203. Enforcement of lien -- sale. If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this ~~section~~ part may enforce said lien in the following manner:

(1) He shall deliver to the sheriff or a constable of the county in which the property is located ~~a--statement~~ an affidavit of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.

(2) Upon receipt of such ~~statement~~ affidavit, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.

(3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. ~~Such--notice--shall~~ Public notice of the sale must be given for not less than 5 or more than 10 days prior to the date of sale.

(4) Before the sheriff or constable sells the property at public auction, he shall give notice of the sale to the owner or person at whose request the work, labor, or services were performed or the materials furnished.

(a) Notice to the owner must be given at least 10 days before the sale in the manner most reasonably calculated to apprise the owner or person who contracted for the services or materials of the sale.

(b) The notice must state:

(i) the time and place of the sale;

(ii) the amount of the claim against the property;

(iii) a description of the property;

(iv) the name of the owner or person who contracted for the services or materials; and

(v) the name of the person claiming the lien.

(c) The notice may be given by personal service or by mailing by certified mail a copy of the notice to the

last-known post office address of the owner or person who contracted for the services or materials.

(d) If the sheriff or constable is not able to effect personal service or service by mail because the location and mailing address of the owner or person who contracted for the services or materials are unknown, the sheriff or constable may give notice by posting notice of the sale in three public places in the county in which the property is located.

~~(4)~~(5) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.

~~(5)~~(6) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff."

-End-

APPROVED BY COMMITTEE
ON JUDICIARY

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(a) Notice to the owner must be given at least 10 days before the sale ~~in-the-manner-most-reasonably-calculated--to apprise--the-owner-or-person-who-contracted-for-the-services or-materials-of-the-sale.~~

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REFERENCE BILL

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-End-

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 16, 1987

The eighth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 16, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members present.

CONSIDERATION OF SB 2: Senator Tom Hager of Senate District #48 told that this bill is the result of the lien law committee. He said physical and occupational therapists will get the benefits in judgments, settlements, and insurance proceeds, as physicians and nurses get.

PROPONENTS: Gary Lusin, licensed physical therapist from Bozeman testified for the bill (see Exhibit 1, written testimony).

Doris Luckman, representing the Joe O. Luckman Physical Therapy, a private practice in Great Falls, testified in support of the bill (see Exhibit 2, written testimony).

Lorin Wright, a physical therapists from Red Lodge, said his practice would improve the cash flow if this bill was a law.

Carol Barnes, physical therapist from Helena, supported SB 2 (see Exhibit 3, written testimony).

Mona Jamison, Montana Chapter of American Physical Therapy Association, felt this was an economic issue and these people should be entitled to reimbursement. She said they are professional medical people just like physicians and nurses. She asked other physical therapists to stand and identify themselves: Mary Mistal, Billings; Clay Edwards, Dillon; Mary Jo Lusin, Bozeman; Charlene Dallec, Great Falls.

Bonnie Tippy, Montana Chiropractic Association, supported SB 2 because these people provided services that should be reimbursed. She presented amendments to the bill (see Exhibit 4). She said these amendments would put all licensed health providers in this bill.

Mike H. Pardis of Helena, represented the Montana Chiropractic Association, explained the amendments (see Exhibit 5, written testimony).

Roger Tippy, Montana Dental Association, said the Dental Association agreed with the amendments from the Chiropractors. He said this extends the purpose of the bill, but does not change it.

OPPONENTS: None

DISCUSSION ON SB 2: Senator Pinsoneault asked what the difference is between occupational and physical therapists. Mr. Lusin responded an occupational therapists deals with daily living activities, such as "motor control" required by a job. He said a physical therapist is licensed to treat the person through the entire body. He said the majority of occupational therapy patients usually have more neurological problems, and physical therapists treat patients more with orthopedic involvement. He said there is a difference, but they do tend to lap over each other in activities.

Senator Crippen questioned why there were no occupational therapists present. He asked if occupational therapists mostly worked in hospitals and if their services are part of the hospital bill. Mr. Lusin said most do work in hospitals but there are some that have their own practice and they don't have lien rights.

Senator Galt asked Senator Hager if he had discussed in his committee the amendment from the Chiropractors. Senator Hager answered that he had just received it. Senator Galt questioned if the Chiropractors or any of the other licensed health care provider, besides the occupational and physical therapists, appeared before Senator Hager's committee. Senator Hager responded none of them did.

Senator Mazurek inquired if any comments were made about any other health care provider besides occupational and physical therapists. Senator Hager replied that counselors were discussed but not put in the bill. Senator Hager commented that one problem the committee faces is some health care providers are licensed and some are not.

Senator Pinsoneault asked if the amendments passed, how many other occupations would be involved. Bonnie Tippy responded that dentists, vets, and dieticans would be the main groups that would come under the amendments and she felt that was not a great amount.

Senator Galt asked what the physical therapists thought of the amendment. Mona Jamison answered she had not seen the amendments and she felt if the word physical therapist is dropped from the bill and "lumped" in as a health care provider it would bring on litigation because the issue becomes who is a health care provider and who isn't. She believed that health care provider is not defined in the codes and so all the groups under "health care provider" will be an undefined word in litigation.

Senator Mazurek commented that the amendment does define "health care provider" as a person licensed under Title 37: to practice one of the healing arts. Senator Hager pointed out occuaptional therapists are licensed under a differnt title than physical therapists. He said right now if someone enters the hospital and needs a physical therapist, then does not pay his bill, the doctor, nurse, and hospital can file liens, but not the therapists.

The committee stood at ease until Senator Halligan returned to introduce SB 16.

ACTION ON SB 33: Senator Pinsoneault felt this bill did not add anything to the authority of the sentencing judge and he asked how many merchants want to have someone who had stolen from them working in the store. Senator Crippen asked Valencia Lane about page 3, subsection 6, line 10, of the bill if that was put there because there was some question whether restitution would be made in the event of shoplifting or was that put in there just to add or make it mandatory. Valencia Lane believed the reason was the proponents testified that often the restitution is returning the item, which is usually in a worthless condition. Senator Crippen felt the involuntary servitude requirement should be eliminated.

Senator Mazurek felt enough options were available to the judge under the current law.

Senator Bishop felt the bill was "wide open" in what merchants could do to a shoplifter.

Senator Crippen moved SB 33 be amended:

Page 3, lines 16 through 24 (b)
Strike: Page 3, lines 16 through 24

He felt there is a problem with shoplifting and thought the proponents should have mentioned employee shoplifting. He said that by leaving subsection (a) on page 3, line 10 there, that will make restitution mandatory. He felt most shoplifting is planned and this is a good step in the restitution system and this amendment would eliminate the involuntary servitude problem. Valencia explained that on page 2, line 12 that it makes it only mandatory if the shoplifter can pay for it.

The motion to amend the bill carried unanimously.

Senator Pinsoneault made a substitute motion of DO NOT PASS on SB 33. Senator Pinsoneault felt the authority is already there and he felt it should stay mandatory.

Senator Halligan felt the involuntary servitude portion was wanted by the retail proponents and he said that he knows of no county attorney who will not request restitution.

Senator Crippen stated that he didn't know how many judges granted restitution on the first offense.

The motion carried with Senator Crippen voting no.

CONSIDERATION OF SB 16: Senator Halligan, of Senate District #29, Missoula, introduced SB 16 to the committee. He explained that he

received a letter from Chief Justice Turnage which stated there was a serious problem with the constitutionality of the agister's lien statutes when there is a sale of an individual's property. He said the statute provides for advertisement but no prior notice before the property is sold. Senator Halligan said we can't do that anymore. He pointed out on page 2 and page 3 of the bill that it sets out basic notice provisions that are in most civil procedure statutes (see Exhibit 6).

PROPONENTS: Bob Helding, Montana Association of Realtors, testified in support of SB 16.

OPPONENTS: None.

DISCUSSION ON SB 16: Senator Crippen asked Senator Halligan to explain what an agister is. Senator Halligan replied that if one wants to pasture someone elses livestock and if that owner of the livestock doesn't pay the individual, then in 30 days the individual can put a lien on the livestock. He said one then notifies the sheriff of the situation and he advertises the property to be sold.

Senator Mazurek asked about page 2, line 14 of the bill with concern about the notice. He felt it might be better to give notice and this is how and as long as you give notice, it is ok. He believed it should not be left open to interpretation to whether or not the particular method chosen is the best method. Mary McCue, staff attorney for the interim lien law committee said the person who performs services should have gotten a mailing address and if he did, then we would hope for actual service, but sometimes that can't be accomplished. She said she could see it needed more explaining. Senator Mazurek said that any time one uses the reasonable efforts requirements to find someone, it is subject to challenge.

Senator Bishop stated that anytime you put in "reasonably calculated" in statute you have a built in law suit because what is defined as "reasonable".

Senator Beck asked if one can't find the person to notify them of the sale, can you still sell it. Senator Halligan replied that on page 3, subsection (d) if you can't find the owner then give notice of a public sale in three public place in the county the property is in.

Senator Halligan closed.

CONSIDERATION OF SB 20: Senator Halligan opened the hearing on SB 20 by going through the bill section by section with the committee (see Exhibit 7).

PROPONENTS: Senator Tom Hager, Senate District #48, stated he was on the lien law committee and supported the bill.

Irvin Dellinger, Executive Secretary of the Montana Building Material Dealers Association, Helena, commented that in the interim committee on this subject the Montana Lien Law Coalition, consisting of the Montana Home Builders Association, Montana Contractors Association, Montana Real Mix, National Electrical Contractors Association, Sheet Metal/Air Conditioners, FIB, and Montana Building Material Dealers, met with the subcommittee on liens to discuss this problem. He felt the people will be better alerted about potential liens even though this bill makes more work for the contractors. He handed out an amendment to the committee:

Page 9, line 6.
Following: "contracting owner."
Insert: "if the notice of a right to claim a lien is not given within the 20 day period, the copy must be filed not later than 10 days after the date on which the notice of a right to claim a lien is given."

Riley Johnson, Montana Home Builders, thanked the lien committee that worked on this bill. He handed out an amendment:

Page 12, line 4.
Strike: the entire paragraph, beginning with " WHEN PAYING your contractor. . ."

Page 12, line 10.
Following: "property"
Strike: "."
Insert: ", or make checks payable jointly to the contractor and the firm furnishing services or materials for which you have received a notice of the right to lien."

He explained that if you are a contractor in Cut Bank and you buy your materials in Billings and a person gives a check to you and the supplier, you then have to drive all the way to Billings to get your second signiture and then drive back to Cut Bank to put the money in the Bank. He said this amendment takes the "spotlight" off notification. He felt a lien waiver should be the first line of defense.

John Gordon, Kalispell Montana, representing himself, testified in support of the bill but did not agree with the Dellinger amendment.

Brad Walterskirchen, Valley Bank in Kalispell, testified the bill gets rid of the secret lien and that is the main problem. He commented that it will create more work for the lenders because they will have to search public records to see who has filed lien notices. He said if they over look someone that has filed, then their lien is subordinate to the construction lien, so it puts a little more pressure on the lenders. He stated the lenders are willing to go along with the bill because it makes sure no one is over looked. He said he disagreed with the Dellinger

amendments because if another 10 days are allowed, it gives the lenders 30 days to have to find the filing and it could be up to 60 days before the lenders are aware of the filing and by then the money might be gone. He felt the amendment should include not only notice of a lien given, but the filing.

John Cadby, Montana Banker's Association, commented that like a new car needs tuning, probably so does this bill by the 51st Legislature in two years. He stated the committee should handle this issue carefully, because it took sometime for both sides to balance with this bill. He urge passage of the bill.

Chip Erdmann, Montana League Financial Institutions, testifed they will be back in two years if it doesn't work and he felt any amendments to the bill should not go so far as to upset the compromise that was created in the interim liens subcommittee.

JoAnne Peres, of Fort Benton, representing the Clerk and Recorders (MACR), supported the bill because it helps the home owner. She said many homeowners who come to the court house and find out there is a lien on the home are shocked. She said the bill does not upset their current fee structure.

William McCauley, Cut Bank Building Service, supported the bill (see Exhibit 8, written testimony).

Mark Meek, Front Street Glass of Helena, supported the bill because the notices seemed to be the best compromise that was presented. He stated that he has limitable resources to use in getting out these notices, but it was the best of the choices we had to deal with.

John Miller, of Bozeman representing the John Miller Construction, supported the bill in the amended form.

OPPONENTS: None

Senator Mazurek commended both sides for their work.

DISCUSSION ON SB 20: Senator Bishop felt the materials or services given in that first 20 days is not addressed in this bill on secret liens. Mr. Dellinger answered the material delivered today to the contractor, January 16, would not receive his statement until the end of the month, January 31st, and he would have up until the 10th of the next month to pay for that job. He stated that this person did not come in until the 12th of the month and the supplier finds out the bills are not paid for so he contacts the contractor, but the contractor says there is money coming in on the 15th of the month. He said the contractor does

not show up with the money. He said now the supplier has to give notice and it has to date back 20 days from the 15th of February but the materials were delivered on the 16th of January, so the notice probably would not have been given. He said most contractors of small projects said they would give notice the day of the first delivery.

Senator Bishop pointed out he has seen it many times in the past that home owners have no idea there is a secret lien against their property and would like to see in the bill a notice up front before anything is done. Mr. Gordon replied that he agreed and he said the first 20 days was deleted out of the notice because the majority of construction work takes longer than 20 days. He did not agree with the amendment that allows 10 more days to file because it extends the gap of getting money additional 10 days.

Senator Halligan explained that the 20 days was the shortest period used among other states. He said he felt most contractors put their notices out before 20 days are up.

Senator Crippen asked how would one handle pre-payments to a contractor in this bill. He said with this bill the money paid in the front part of the contract is not bothered, it is the back part of the contract that gets you in to trouble.

Senator Mazurek asked Mr. Dellinger to explain his amendment. Mr. Dellinger responded the amendment would allow a notice that is given on the 45th day to the owner to be given a few days extra to file with the clerk and recorder in case something comes up.

Riley Johnson asked that if you go into court, what time is the lien effective 20 days back. He said the mail service or a three day holiday might effect the day, but this does depend on the court's interpetation.

John Gordon believed it was not a necessary amendment because the bill already states that both the lien and filing have to happen somewhere in the 20 day period. He commented it doesn't make any difference when you file because if you don't file it within the first 20 days after you first deliver it, your lien is only good for 20 days before you have given, served and filed.

Senator Mazurek pointed out there is really not a 20 day period in which to give the notice to the owner because giving the notice and filing should start the 10th day, because there might be problems with the delivery of the notice. He asked if this is problem. Mr. Gordon said he does not see the necessity of the amendment because you have a gap period; there is nothing in the statute that says you have to wait until the 20th day. Senator Mazurek felt there should be a "window" between the time the notice is given to the owner and the time you file, so to

give the owner time to react to the notice. Mr. Gordon said there will not be action from the owner with a notice of intent to lien. He said the reason for filing is documenting for the purpose of the supplier.

Senator Halligan felt there should be some flexibility for legitimate contractors and subcontractors who deal with each other, who don't file their liens because they trust each other.

Mr. Waltherskirchen felt an amendment is needed because there is a search for the ones who didn't pay and his department needs a record of them. He commented if a notice is just given to the contracting owner, we would have no way of knowing, if he forgot to tell us. He said the result is the guy is not going to get paid, and we lose our lien position because we didn't pay the subcontractor. He felt three days is more reasonable than 10 for filing.

Senator Halligan closed by saying this is the best compromise the committee came up with to deal with double payment by the consumer.

The committee adjourned at 11:50 a.m.

Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 16th, 198

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE Jud.

BILL [redacted] SB 2 DATE Jan 16

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOS
Charlene Dallee	Physical Therapists	Great Falls	X	
Mary Jo Susin	Physical Therapists	Bozeman	X	
Mary Mistal, P.T.	Physical Therapists	Billings	X	
Gary Susin	Physical Therapist	Bozeman	X	
Doris Luckman	Owner Business Mgr.	Great Falls	X	
Clay Edwards	Physical Therapist	Dillon	X	
Mimi Jamieson	Mt. Chapter of American Physical Therapy Assn.	Helena	X	
Lorin R Wright	Physical Therapists	Red Lodge	X	
Carol Barnes	Physical Therapist	Helena	X	
Tom Thomas	Senator Williams	Helena		
Bonnie Tippy	MT Chiropractic Assn	Helena	X	
Mike Paulin, D.C	MT Chiropractic Assn	Helena	X	
Roger Tippy	MT Dental Assn	Helena	X (Amend)	
~~Jon Noble~~	~~MT BPT~~	~~Helena~~	~~X~~	
~~Mike Sherwood~~	~~MBK~~	~~Great Falls~~	X	
~~Jack Gunn~~	~~Paulsen's~~	~~Gt Falls~~	X	
~~K. Stockton~~	~~Paulsen's~~	~~Gt Falls~~	X	
Tom Simkins	Simkins Hall	Bozeman	✓	
~~William L McCauley~~	~~First Bank Building~~			

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE Fed

BILL SB 16 DATE Jan. 16

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOSE
Bob Helding	MT. Assoc. of Realtors	Missoula, Mt.	X	
~~Mark Meek~~	~~Mt Montana Home Builders Assoc~~	~~Helena, MT~~	~~X~~	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE Jud

BILL SB20 DATE Jan. 16th

SPONSOR

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOS
Jeanne Peres	Clerks & Recorders (MACR)	Fort Benton	X	
Johnny Carey	MT Bankers	Helena	X	
Chip Erdmann	MT League Financial Inst	Helena	X	
Riley Johnson	Mont. Home Builders	Helena	X	
John Gordon	myself.	Kalispell	X	
William L Bradley	Cut Bank Building Service	Cut Bank	X	
Kenneth Kolb	UBC	Helena	X	
Bruce Walters Richten	Valley Bank	Kalispell	✓	
Mike Lattier	U.B.C.	Helena	✓	
H S Hanson	MT Tech. Council	Helena	—	
John L. Miller	John L. Miller construction	Bozeman	—	
Allen R Rogers	Woody's Building Supply	Conrad	—	
Joyce K Rogers	- - -	-	—	
Mike Mull	Power Townsend Co	Helena	✓	
Hal Hay	Intermountain Lumber	Helena	—	
Jim Moore	Moore Construction	Helena	✓	
Mark Meek	Front Street Glass	Helena	✓	
Mike Whitaker	UBC	Butte	✓	
Orrin Ferdinandy	MBMDA	Helena	✓	
Jack Ivers	Parsons Inc.	Gt Falls	✓	
Karl Englestad	Parsons Inc	Gt Falls	—	
Bob Pyfer	Mont. Credit Unions League	Helena	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Jan. 16, 1987
BILL NO. SB 2

BOZEMAN
PHYSICAL THERAPY CENTER
Suite 703G • Medical Arts Center
300 North Willson
Bozeman, Montana 59715
(406) 587-4501

To: Senate Judiciary Committee

Re: Senate Bill 2, An Act Establishing Lien Rights for Physical Therapists and Occupational Therapists; Amending Sections...

I am a physical therapist from Bozeman, Montana, and have been in practice for five years. Confronted with the demands of a small business, one of which is the endless job of collecting reimbursement for our services, requires as many legal options as possible to assure cash flow. Often our reimbursement comes long after service has been provided and terminated.

Typically we see many patients involved in accidents that result in litigation and we presently have outstanding accounts close to three years old in this category. Our office has over $4,000 of service already provided that could possibly have been secured by a lien being applied.

I hope you will pass this bill as it stands to help those of us in small business in the field of physical therapy to collect debts owed us for services provided.

Respectfully,

Gary Lusin dk

Gary Lusin

GL:dk

Gary Lusin, P.T.
Mary Jo Lusin, P.T.

PHONE 761-0471

JOE O. LUCKMAN, P.T.
PHYSICAL THERAPY CONSULTANT
Great Falls Medical Building
1220 Central Avenue
GREAT FALLS, MONTANA 59401

SENATE JUDICIARY
EXHIBIT NO. 2
DATE Jan. 16th
BILL NO. SB 2

January 16, 1987

TO THE CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

I am Doris Luckman, co-owner and Business Manager of Joe O. Luckman, P.T., a private practice Physical Therapy office in Great Falls, Montana.

I am here today to ask for your support of Senate Bill 2, entitled "An Act Establishing Lien rights for Physical Therapists and Occupational Therapists".

We feel that people who have been injured seriously enough to need our services and who choose to come to us should expect to pay for the services they ask for and receive.

We are a small business that has operational expenses and it is not fair to be expected to provide service with no protection. We believe that when someone does get a settlement it is only fair for us to be assured of payment for the service they received from us.

At the present time we have approximately twelve patients whose cases have been under litigation for up to three years, during which time we have received no remuneration for treatments given.

We have also had patients who have received settlements which included our balances and have chosen not to pay our bill or to only partially pay it.

Therefore, we feel the need for a legal structure to enable us to file a lien in order to collect outstanding bills when settlements are awarded.

Thank you for your time, attention and consideration of this matter.

Doris Luckman

Doris Luckman

SB 2

Helena
Physical
Therapy
Associates

Carol Barnes, R.P.T.
Cheryl Hanson, R.P.T.
Kirk Hanson, R.P.T.

2615 Colonial Drive Helena, Montana 59601 406 443-5555

I support the addition of Physical Therapy to the lien bill. In the past six months, we have filed 11 liens. In one case, our lien was not honored. The patient was given his settlement, but we have not received any payment for our services.

Liens allow recourse in court if payments are not made. Physical Therapists, like MD's and nurses, need the legal protection that the filing of liens provides.

Thank you.

Carol Barnes PT

Carol Barnes
Physical Therapist
Private Practice

SENATE JUDICIARY
EXHIBIT NO. 3
DATE Jan 16 '91
BILL NO. SB 2

SENATE JUDICIARY
EXHIBIT NO. 4
DATE Jan. 16 1997
BILL NO. SB 3

Senate Bill 2, first reading.

1. Amend title, p. 1, line 6
   Following: FOR
   Insert: all licensed health care providers, including

2. Amend p. 1, line 13
   Following: line 12
   Strike: Physician, Nurse, Physical Therapist, Occupational Therapist,
   Insert: Licensed Health Care Provider

3. Amend p. 1, line 17
   Following: for
   Strike: physicians, nurses, physical therapists, occupational therapists,
   Insert: licensed health care providers

4. Amend p. 1, line 24
   Following: line 23
   Insert: Section 3. NEW SECTION. Licensed provider defined. As used in this part, "licensed health care provider" includes any person licensed under Title 37 to practice one of the healing arts.
   Renumber: following sections

5. Amend p. 1, line 25
   Following: of
   Strike: physicians, nurses, physical therapists, occupational therapists,
   Insert: licensed health care providers

6. Amend p. 2, line 2
   Following: a
   Strike: physician, nurse, physical therapist, occupational therapist,
   Insert: licensed health care provider

7. Amend p. 2, line 5
   Following: line 4
   Strike: physician, nurse, physical therapist, occupational therapist,
   Insert: licensed health care provider

8. Amend p. 2, line 17
   Following: a
   Strike: physician, nurse, physical therapist, occupational therapist,
   Insert: licensed health care provider

9. Amend p. 2, line 25
   Following: a
   Strike: physician, nurse, physical therapist, occupational therapist,
   Insert: licensed health care provider

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Jan. 16, 1987
BILL NO. SB 2

DR. MIKE PARDIS
Chiropractor
950 N. Montana
Helena, MT 59601

Telephone: (406) 449-7500

January 16, 1987

Senate Judiciary Committee

Re: Lien rights for Physical Therapists and Occupational Therapists (Senate bill #2)

Mr. Chairman and Members of the committee:

My name is Mike Pardis. I'm a chiropractor from Helena, Montana. It is my pleasure to be here to represent the Montana Chiropractic Association. We support Senate Bill #2 in its amended form for the following reasons:

1. As you're probably aware this bill has been submitted in previous years. Two years ago it was killed in committee as it represented only the physical therapy group.

2. This year the bill includes occupational therapists as well as the physical therapists. It seems logical that if a particular profession is licensed by the state it should be able to establish lien rights as well. (ie. Dentists, Chiropractors, Veterinarians, etc.)

3. Everyone likes to have their bills paid. When we, as a professional, perform a service to an individual, we expect to be paid in return. Often a service is performed with the likelyhood of recovery from a settlement to which the patient ultimately receives. A lien would establish that right.

4. Currently even a carpenter, plumber, or tradesman has the right to file a lien. If you don't believe me, try hiring one and don't pay him, and see what happens. Shouldn't a professional have that same right?

In summary, if this bill is not passed in its amended form, you can expect the professionals, one after another, to be back up here year after year until they are. Personally, I believe you as a group have more important issues to address you valuable time to.

Sincerely,

Michael H. Pardis, D.C.

Summary of SB 16: "AN ACT REQUIRING NOTICE TO THE OWNER OR PERSON WHO CONTRACTED FOR THE SERVICES OR MATERIALS PRIOR TO A SHERIFF'S SALE OF PROPERTY SOLD TO ENFORCE AN AGISTER'S LIEN OR LIEN FOR SERVICES; AND AMENDING SECTION 71-3-1203, MCA.

Background: This issue was brought the attention of the Joint Interim Subcommittee on Lien Laws when the Montana Supreme Court decided the Rose v. Myers case in August 1986. The appellants sought to declare a sheriff's sale of their horses invalid under the agisters' lien statutes, 71-3-1201 through 71-3-1204, as unconstitutional for failure to provide for notice and an opportunity to be heard prior to deprivation of property.

The statute that provides for enforcement of the lien through sheriff's sale presently states that a person who has not been paid for work or materials he provides with regard to an article or animal left in his possession may enforce his statutory right to a lien through a sheriff's sale. To enforce this possessory lien the lien claimant merely must deliver to the sheriff a statement of the amount of the lien, a description of the property, and the name of the person at whose request the work or materials were furnished. The sheriff then must advertise a sale and sell at public auction an amount of the property sufficient to pay the amount owed.

Problem: In the Rose case the court found that the appellants had actual notice of the sale prior to the sale. Thus the sale was valid as they were aware that their property was in jeopardy and could have prevented the sale by paying the amount owed the agister. But the court called the Legislature's attention to the due process provisions of Article II, section 17, of the Montana Constitution, the Fourteenth Amendment of the U. S. Consitution and their application to the notice provisions of 71-3-1203.

Those provisions are calculated to give notice to the public of an impending sheriff's sale. They do not require that the owner of the property be alerted that his property will be sold to satisfy the agister's lien. Thus he does not have an opportunity prior to the sale to satisfy the lien.

Solution: This bill requires that the sheriff, before he sells the property at public auction, shall give notice of the sale to the owner or person at whose request the work or materials were furnished. The notice must be given at least 10 days before the sale in the manner most reasonably calculated to apprise the owner of the impending sale.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE Jan. 16th, 1987
BILL NO. SB 16

SENATE JUDICIARY
EXHIBIT NO. 7
DATE Jan. 16, 1987
BILL NO. SB 20

Summary of SB 20: General Revision of Mechanics' Lien Statutes

Present law: Under the literal language of 71-3-501, mechanics' liens are avilable to any person performing work on or supplying materials for any consturction project, regardless of such person's contractual relationship to the owner or prime contractor.

Liens are created by filing with the county clerk, within 90 days after the work has been performed or materials furnished:

a. a verified description of the property to be charged;
b. an account of the charges.

The owner may shorten the period of time in which a lien may be filed to 60 days be filing a notice of completion, either when the work has been accepted or 30 days after the cessation of all labor.

The lien attaches to the estate of the person for whose benefit the work was done, i.e., if such person is a mere lessee, to his leasehold only. However, if the leasehold is forfeited (presumably by default) the lien continues to attach to the improvements put in place by the lienholder. The improvements may be sold and removed to satisfy the lien.

As to priorities, the attaches to the building on which the work was done in preference to any prior lien or mortgage. The lien attaches to the land and takes priority over existing mortgages if:

a. the work was done under a contract for the erection of a building or improvement; and
b. the work was begun before the lien of the mortgage attached (even though the mechanics' lien was only filed later) after completion of the work.

The relative priority of mechanics' liens is by classes:

a. all liens filed within 30 days of the first lien for work done on the same premises share equally, pro rata, with such first lien;
b. all liens filed after such 30 days (if within 60 days of the first such lien filed) share equally, pro rata, in any proceeds that remain after all the liens of the first class are paid.

Provisions of SB 20: Who may claim a lien? A person who furnishes services or materials under a real estate improvement contract.

What is the extent of the lien? It extends to the interest of the contracting owner as it existed at the time the work was commenced or was thereafter acquired. As in the present law, if the improvment was to leased premises it attaches only to the lessee's leasehold interest and to the improvement if it can be severed from the property without harming the rest of the property.

What is the amount of the lien? As with the present law, it is for the unpaid portion of the contract price.

What are the requirements for claiming a lien? Except under certain circumstances, the lien claimant must give a notice of a right to claim a lien to the contracting owner within 20 days of first furnishing services or materials. This is a new requirement not presently in the law. The purpose of this notice is to alert the owner that he should protect himself from having to pay any contractor or supplier twice for the same service. The lien claimant also must file a lien not later than 90 days after he finally furnishes services or materials, or 90 days after the owner files a notice of completion under 71-3-512.

For purposes of priority, the lien attaches at the commencement of work on a particular real estate improvement project. Construction lien claimants working on the same real estate project share pro rata in the proceeds of a sale. If their construction liens attached at different times because they worked on different improvement projects they have priority in the order in which work on their particular improvement started.

With regard to priority of construction lien holders as against other claims, the construction lien claimant has priority over any lien filed after the construction lien attached, i.e., the start of the project. A lien filed before the construction lien attaches has priority except if:

a. the particular improvement may be severed and sold to satisfy the construction lien without damaging the remainder of the property; or

b. the other lien is for a construction loan, i.e., one given to secure advances to pay for that particular construction project.

Im William L McCauley of Cut Bank Bldg Service of Cut Bank, Montana.

I also am president of the Montana Bldg Material Dealer Assn.

In the last legislature we were faulted for not having a change to the lien law that would satisfy us and the consumer and were charged with coming up with some thing this session.

Mr Dillinger, the coalition and a group of my peers along with your ~~Sub~~ very active Leg. committee now have what we feel is a lien law that we can live with

GLACIER TOOLE POWDER R TETON FLATHEAD. LIBERTY CASCADE

We all realize that no one wants to pay twice for anything but if small business is to exist we need protection to be paid once. I would much like to take a few minutes of the committees time to explain the workings of the bill.

My firm has keeping system will be set up to send out the notifications immediately but being we will be working with approx 3 different county court houses covering approx 200 miles it is easy to see why the time element is as it is It will be extra work, but if it will get bills paid the consumer protected lets put a do pass on Senate bill 20.

SENATE JUDICIARY
EXHIBIT NO. 8
DATE Jan 16th 1987
BILL NO. SB 20

NAME: Gary Lusin DATE: 1-16-87

ADDRESS: 300 N. Wilson Bozeman MT 59715

PHONE: 587-4501

REPRESENTING WHOM? Bozeman Physical Therapy Center

APPEARING ON WHICH PROPOSAL: Senate Bill 2

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: Written statement provided

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Doris Luckman DATE: 1/16/87

ADDRESS: 1220 Central Ave

PHONE: 761-0471

REPRESENTING WHOM? Joe O. Luckman, P.T.

APPEARING ON WHICH PROPOSAL: Senate Bill 2

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: _____

Written statement to be given Senate Staff

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Carrie Pires DATE: 1-15-87

ADDRESS: Fort Benton

PHONE: 622-5151

REPRESENTING WHOM? Clerks & Recorders (MACR)

APPEARING ON WHICH PROPOSAL: SB-20

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

STANDING COMMITTEE REPORT

January 16 19 67

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration SENATE BILL No. 33

first reading copy (white color)

RESTITUTION AND SERVICE TO STORE OR COMMUNITY BY SHOPLIFTERS

Respectfully report as follows: That SENATE BILL No. 33

is amended as follows:

1. Title, line 5.
Following: line 4
Strike: "AND SERVICE TO AN ESTABLISHMENT OR THE COMMUNITY"

2. Page 3, line 10.
Following: "(6)"
Strike: "(a)"

3. Page 3, lines 16 through 24.
Strike: subsection (b) in its entirety

DO PASS

DO NOT PASS

Chairman.

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 19, 1987

The ninth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 19, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All members were present.

CONSIDERATION OF SB 52: Representative Joan Miles of House District #45 introduced SB 52 for Senator Bob Brown because he was delayed. She said the bill will cost $273,000 more in fiscal year 1988 and $263,000 in fiscal year 1989. She said the current system is "File and Use", which allows the Insurance Commissioner to regulate insurance rates to insure that they are not inadequate, excessive, or unfairly discriminatory. She stated that the Insurance Commissioner doesn't have the staff or the money to do this. She explained that in the Govenor's budget book on page S 24 the modified requests coming from the Commissioner's office has $230,000 in fiscal year 1988 and $223,000 in 1989 to implement the power they currently have. Representative Miles felt this program was underfunded because of the liability crisis. She said there is a bill in the House which raises insurance filing fees which will go to this insurance division. She explained that the fiscal note reflects the figure needed now; it is not just for the flex system, but for the office functions now. She explained "file and use" makes all insurers file the rates they are charging. She said then the Commissioner judges the rates. She pointed out that there are currently four ways insurance rates are set: 1) "Open Competiton"; they don't even file with the State Commissioners. 2) "File and Use". 3) "Prior Approval"; they have to file and then receive approval before they implement the rates. 4) "Rate Setting"; the state agencies set the limitations on the rates. She said what this bill is a combination of the "File and Use" and "Prior Aprroval". She explained that it gives the Insurance Commissioner a zone of reasonableness so an insurance company could adjust its rates in this zone and not have to file with the Insurance Commissioner. She said they can work competitively and adjust their rates if necessary. She stated if they go below or above the zone, they have to get prior approval of the rates. She echoed this system would get the insurance companies to be competitive and increase consumer protection. She felt it will inform the public about prices of liability insurance. She thought the bill would avoid the early 1970's problem when the insurance industry engaged in "cash flow underwriting"; this covered poor risks at very low premiums, in order to generate enough funds to deposit in the high interest bearing accounts. She said there was a decline of interest rates, which reduced profits and caused part of the "sky rocketing" liability rates.

PROPONENTS: Tanya Ask, Montana Insurance Department, supported the concept of the bill. She stated California is an "Open Competition State but as of 1986, they adopted a Flex Rating system, which means if an insurance company wants to change its rates plus or minus 25 percent of its current rates, the company must file those with the Commissioner. She told a story about the department asking for documentations on a rate filing, but the department marked it "received" and stored it because it was a huge stack of papers, which no one was available to evaluate because of the lack of staffing. She said the department has a half-time person that looks at rates to see whether they are correct or not; the person is also responsible for approving all the casualty and property forms of the state. She pointed out New York has adopted this form of rate setting. She also said that most of Montana's rate filings are in a band of less than 20 percent.

Karl Englund, Montana Trial Lawyers Association, testified in support of the bill (see Exhibit 1, written testimony).

OPPONENTS: Randy Gray, State Farm Insurance Company, and National Association of Independent Insurers, opposed SB 52 because the old system works well and only 1/3 of one percent of the total insurance market in the U.S. is in Montana. He felt what happens in Montana will not effect the country. He felt it would make insurance less available to Montanans because it would make Montana less attractive place for insurance companies to do business. He stated granting the Insurance Commissioner this much discretion in the new bill will leave insurance companies without any predicability on whether or not their proposed rates will be increased. He suggested if you do consider this bill, to establish a perimeter in which the commissioner can work. He felt the Legislature should establish the bands and not the Commissioner. He said in section four it deletes Montana's competitive rating intent of the current insurance law. He thought there is good competition between carriers in Montana and this substantial shift from the current law will effect it. He pointed out some lines of insurance is more available than others. He suggested the Commissioner or Legislature identify the lines of insurance that are not readily available and have problems. He felt the funding was not adequate because if the Commissioner is going to be reviewing the policies of 1,200 companies that are doing business in Montana, but how is he going to accomplish this with the eight full time employees requested in the fiscal note. He pointed out that states that have the "Prior Approval" approach have a tremendous amount of political pressure to approve decreases and sometimes this does not help the market place.

Bonnie Tippy, representing the Alliance of American Insurers, opposed the bill (see Exhibit 2, written testimony).

Glen Drake, American Insurance Association, opposed the bill (see Exhibit 3, written testimony).

DISCUSSION ON SB 52: Senator Halligan questioned how the Commissioner's office plans to handle over-viewing 1,200 companies. Tanya Ask responded that a lot of the forms and rates submitted to the office for approval or review are submitted by a rating organization. She said companies may deviate off of those rate filings and some companies also develop their own rates. She said about half of the 1,200 are property/casualty companies. She said much of the filing is done by rating organizations, but there is still substantial filings to look at. Senator Halligan asked if any insurance costs in Montana are based on Montana claim experience. Ms. Ask replied that Montana rates are based in part on Montana experience and it is going to depend on the company, and how much of their experience Montana has generated. She said rating organizations keep track of specific Montana experience. She felt the more a company does business in the state, the more the rate will be on Montana experience. Senator Halligan asked if a band is set, could the band reflect the Commissioner's opinion of the Montana claim experience. Ms. Ask stated the companies that have more experience in Montana have their rates already being reflected in Montana experience.

Senator Crippen asked Roger McGlen, Independent Insurance Association of Montana, how the flex system effected other states like Montana with the availablity of insurance. Mr. McGlen responded that there is not enough data to tell whether it has effected the availability. He pointed out the bill calls for a hearing and some insurance companies might withdraw from that particular line to get away from the hearing process. Senator Crippen questioned if Mr. McGlen's main concern was the fact the rates now are not adequately monitored and this could lead to some abuse along the way. Mr. McGlen felt it was one of his main concerns because if the system is cumbersome, and being a small market, many will not participate.

Senator Pinsoneault asked Representative Miles to comment on the Bonnie Tippy and Glen Drake statement of never having enough help in the Commissioner's office to even shake out the "File and Use" system now. Representative Miles stated that it is correct. She said the Commissioner has stated that in order to run the "File and Use" system correctly they will have to have an additional six and half F.T.E's. Senator Pinsoneault inquired whether Ms. Ask agreed with it. Ms. Ask replied that the modified budget requests were passed out of committee and they don't have adequate funding right now. She said the fiscal note includes investigators and clerical workers, which are desperately needed.

Senator Mazurek asked if the Legislature did adequately fund the F.T.E's under the "File and Use" system, could one rely on information generated from New York or California in applying to the "File and Use" system. Tanya Ask replied that they do look at a nationwide experience and the states' experiences around us.

Senator Crippen questions if the department needs $50,000 to provide

additional staffing just to run the flex system. Tanya Ask said it goes to the Flex system and to other areas of the office, such as the "complaint handling". Senator Crippen felt if you don't get the F.T.E's and if this more complex system is passed, the department would be in worse shape than it already is. She agreed with that. Senator Crippen asked if the F.T.E's don't come through, would the department want this new system. She said no.

Senator Blaylock asked if the system was working, could the Commissioner make the point stick to insurance companies, not to put their premiums too low. Representative Miles felt the authority was there to do that. She felt there has been no type of review, so there has been no justification for the raising or decreasing of insurance rates. She said she did not know if the Commissioner could stop an insurance company from decreasing its rates.

Senator Crippen asked why would the Commissioner be upset about a rate that is below the range if the company has a willing buyer. Representative Miles felt there probably would not be a big objection to a lower price in our small market. She stated this system is trying to keep us out of the same bind we are in now, but some say that the State is such a small market, we would not have an effect upon the whole system, so if we can offer Montanans lower prices and justify it as a good deal for both parties then it can be done.

Senator Bishop explained that his daughter and himself have practiced law for five years; the first three years the premiums on the Errors policy ran between $400 $700. He said last year in March it jumped to $2,800; this was minimum liability. He said she is by herself now in the practice and is thinking of "going bare" because the premium on the policy now is $4,500 a year. He asked if this bill would have an effect on this type of insurance. Representative Miles responded there is no one single reason or solution for the increase in premiums. She said people who say nothing will stop the increase of insurance rates also mean the tort reform will not help either. She felt if the bill goes through, the premium holder will at least have justification of why it is going up. Randy Gray replied this bill covers all lines of insurance whether professional or other. He said professionals are becoming more of the target for malpractice suits and like doctors these professionals are getting malpractice type insurance. Mr. Drake pointed out he did not say that the small market in Montana would have no effect on the nation's situation.

Senator Brown closed by saying the bill is designed to promote and restore stability of the insurance market. Representative Miles echoed the fact that if the department doesn't get the F.T.E's then they can't use this bill's system. She pointed out the bill in the House increased

certain insurance fees with the hopes that they would earmark that into these programs, because this is not expected to come out of the general fund.

Adjourned to the table for executive action.

ACTION ON SB 49: Senator Beck asked if the Robischon amendments were really needed. Senator Mazurek responded that maybe it should be limited to charitable organizations. Senator Pinsoneault said he would like to see the conservation districts protected. Senator Mazurek commented the Tort Claims Act protects conservation districts. He also commented to the committee that they should stay away from the illegal acts part of this bill in the first section. He thought the committee should define "volunteer" for future litigation. Senator Mazurek then asked if this should be tax exempted like churches. The committee decided to wait on taking any action on the bill.

ACTION ON SB 16: Senator Pinsoneault moved:

> Page 2, lines 14 through 16.
> Following: "sale" on line 14
> Strike: the remainder of line 14 through "sale" on line 16

The motion carried unanimously. Senator Pinsoneault moved the bill AS AMENDED DO PASS. The motion carried unanimously.

ACTION ON SB 2: Senator Mazurek stated that Roger Tippy said the committee should define "health care provider". Valencia Lane responded the "health care provider" is under Title 37 of the MCA. Senator Pinsoneault said he could see giving them filing rights because it is defined to groups. Senator Crippen felt other groups can amend themselves into the statute because no other groups spoke on this subject, so they must not feel strongly about this. Senator Brown thought the bill should have Chiropractors because they did come to the hearing. Senator Beck said they should come in with their own amendment to get into the bill. Senator Halligan responded they were not at the subcommittee when they worked on this bill. Senator Bishop moved to include the Chiropractors. Senator Mazurek asked what should be done with the dentist because they were represented at the Judiciary hearing. Senator Bishop withdrew his motion. Senator Halligan moved to have Chiropractors and Denists included in the bill. The motion carried unanimously. Senator Halligan moved the bill AS AMENDED DO PASS. The motion carried with Chairman Mazurek voting no.

ACTION ON SB 20: Senator Mazurek stated the committeee has to make sure the 20 days starts on the mailing date in this bill. Valencia said on page 8, line 16 through page 9, line 6, the owner can mail a notice on the 19th day after service, as long as he can prove it, and should still be effective. Senator Mazurek echoed that the statute should have the

mailing date be the start of counting back. He felt the statute should state "deposit in the U.S. mail" in (3) on page 8. Senator Halligan moved:

Page 8, line 24.
Following: "him."
Insert: "Notice by certifed mail in effective on the date the notice is mailed."

Page 8, line 25.
Following "shall"
Insert: "also"

Senator Bishop said we are just giving people notice of what the law is. The motion carried. Senator Halligan asked what is going to happen to the "good, trustful, friend" cases. Senator Mazurek stated if the supplier doesn't file the 20 day notice he can't claim a lien on that 20 days. He felt the committee should wait on action until the groups agreed on the time limit of notices. Senator Mazurek commented they should work on page 12, line 5. He said there should be a revision on the joint accounts because they don't want to run to different places to get signatures. Senator Halligan felt the problem was not a bad one.

ACTION ON SB 40: Senator Halligan stated the committee accidently combined victim and family in this bill and the bill is geting more complicated because of the sexual offense part being brought into it. Senator Mazurek refreshed everyone's memory on this bill and what they had done with it so far. Senator Halligan moved to limit the services to only parents, brothers, or sisters (certain relatives). The motion carried. Senator Halligan moved the bill AS AMENDED DO PASS. The motion carried.

The committee adjourned at 12:00 p.m.

Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Jan. 12th

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X came on 1/2 hour late		X
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE Aud

BILL SB52

DATE Jan. 19th, 1987

SPONSOR Brown

NAME	REPRESENTING	RESIDENCE	SUPPORT	OPPOSE
Bonnie Tippy	Alliance of Am Insurers	Helena		X
Ellen Dyakyp	Am Ins Ass'n	Helena		X
Roger Williams	INDEPENDENT INS. AGENTS ASSOC. of MT	Helena		X
Wendy Keenan	State Auditor's	Helena	X	
Marilyn Lee	State Auditor's Office	"	X	
Randy Gray	State Farm, NAII			X
CALEB SHIELDS	F.T. PECK TRIBES	POPLAR		
Riley Johnson	PIA of Mont.	Helena		
H. Eck	CITIZEN	BOZEMAN		
Bryan Enderle	Missoula Chamber of Comm	Helena		
[illegible]	not registered any	Helena		
Dean Christensen		Sanders		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SENATE JUDICIARY
EXHIBIT NO. 1
DATE Jan. 19, 1987
BILL NO. SB 52

A bill requiring experience rating is attached as Exhibit I1. Regulations specifying how doctors can be experience rated are attached as Exhibit I2.

3. Establish flex-rating

If insurance companies were fully subject to the antitrust laws, then rate regulation might be unnecessary; the market would determine the proper level of rates. However, because under the McCarran-Ferguson Act ~~insurers may legally fix prices and engage in other anticompetitive activity,~~ regulation of insurance rates is ~~essential.~~ left to the states.

To allow the market to work as competitively as possible despite McCarran-Ferguson, insurance companies should be permitted to raise or cut their rates without approval by the insurance commissioner within a "zone of reasonableness" - say, 15% above and 15% below the existing rate. Above or below that rate, however, states should not permit a rate to take effect unless and until the insurance comissioner approves the rate. Requiring such prior approval of rates except those within the zone of reasonableness should both smooth out the insurance industry cycle and enhance competition in the industry.

~~A bill requiring prior approval of insurance rates except those within a zone of reasonableness - so called "flex-rating" - is attached as Exhibit J.~~

4. Beef up enforcement

It is well-established that state insurance departments

SENATE JUDICIARY
EXHIBIT NO. 2
DATE Jan. 19th, 1987
BILL NO. SB 52

TESTIMONY, SENATE BILL 52
JANUARY 19, 1986
SUBMITTED BY BONNIE TIPPY, REPRESENTING THE ALLIANCE OF AMERICAN INSURERS

The intent of this bill, and indeed of many of you, is to somehow stop the insurance cycle which many believe is what brought us to where we are today in terms of the availability and the affordability of insurance.

What you keep hearing from the Montana Trial Lawyers, both in this session and previously, is that the insurance cycle is solely to blame for our problems, and that the tort system has nothing to do with it at all.

This simply is not true. While the cycle can either mask or worsen the effects of a tort system which is out of control, it is true that insurance losses are driven by the long-term effects of the tort system.

The New York Governor's Advisory Commission On Liability Insurance recently issued Volume 2 of its report on the tort and insurance systems. The commission concluded: "The Short Term Swings and the prices charged for insurance are controlled in substantial part by the business cycle, but the bedrock trends in average underwriting costs around which these cycles gyrate have little or nothing to do with business cycle fluctuations."

The commission found a "surge" in the liability cost base in recent years as prevailing concepts of tort liability have been expanded. And there is ample documentation for these conclusions. According to ISO, after adjusting for inflation, the combined losses and expenses for all lines of insurance increased between 1967 and 1984 almost two times, or 96.4 percent. Commercial liability lines increased well over two times at 131 per cent and general liability including medical malpractice increased more than three times, at 201 percent. The facts show that paid losses, unaffected by reserving or expense loadings, have increased

far faster than the gross national product.

There is no question that long-term premium increases reflect much more than the normal insurance business cycle. For decades, the insurance cycle has swung back and forth around constantly increasing losses. Simply stated, these losses are fueled by abuses of the tort system.

This bill attempts to save the insurance industry from itself, but we must realize that many factors affect the insurance cycle which absolutely no one has any control over whatsoever. Those include interest rates, inflation, taxation of captive insurers, the overall U.S. business cycle, the value of our dollar relative to other world currencies, the stock market and spiralling underwriting losses. Of all of the factors which have controlled surplus decline, the industry had some measure of control over only one- -spiralling underwriting losses. The industry has had little choice but to raise premium rates and withdraw from bad lines of business.

So what the companies did that added to today's problems was lower their rates too much, it was cut-throat competition, and the companies which attempted to stop the downward spiral in rates found themselves with catastrophic losses of market share.

This bill attempts to take care of this type of ruinous competition. But what will it really do if you choose to enact it? While chief supporters of this legislation claim that it will control downward rates, what they really seek to do is prevent rates from going higher, and this could drastically affect market stability and insurance availability.

Can this type of system work better than an open, free competition market? We say no, it cannot. Insurance, most particularly automobile insurance, is extremely market sensitive. Under this legislation, any time rates went under the band, a hearing would have to be held. Will this serve to lower prices, or to encourage insurers to keep them the same? Is it really in the best interest of Montana consumers to enact artificial price controls, other than allow a very competitive industry to compete fairly? We

don't think so.

We believe that the Insurance Commissioner has enough authority now to keep insurers in line. However, her office has historically been underfunded, and she has been unable to exercise that authority to the fullest extent. Perhaps you could consider adequately funding her office to fully implement her current authority for the next two years. Then, in 1989, you can more fairly assess whether or not that is enough.

It is true that there is a liability crisis, and it is also understandable that you would want to balance tort reform with some form of adequate regulation of insurance companies. But to unfairly burden a highly competitive industry which is also in great distress at this time will only serve to make a bad situation worse. Help Commissioner Bennett to do the job you have already given her to do. I believe that you will find that with adequate funding, she can do it very well.

I urge that this committee act on this bill with a strong "do not pass" recommendation.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 1-19-87
BILL NO. S.B. 52

Testimony of American Insurance Association by Glen Drake on SB 52

Flex rating is touted as a regulating means to control insurance rate increases or decreases and this controls future cycles.

Obviously, with only 1 percent of the total commerical insurance market in the country, the state of Montana is not going to have any meaningful impact on the future cycles, regardless of what actions it takes.

Thus, the question becomes, what regulartory approach of the insurance industry is best for Montana.

There are three basic regulartory systems now in use in the county. A.I.A. supports a strong insurance commissioners office with adequate staff to do the job under a file and use system that is best suited for Montanas needs.

The proposed flex system, because of the mandatory hearing requirement would be not only extremely expensive in times of either improved or downward market trends, but would be counter productive in the area of insurance availability. The cost of hearings both to the State and counties will have a chilling effect o those lines of insurance where problems of availability exists.

A.I.A recommends that the Insurance Commission be given additional funds to hire needed personel and that the present file and use system be retained.

There is an old saying "If a thing is not broke - don't fix it"

File and Use which Montana uses in which an insurance company files its rates with the Commisions and then can procedd to use those rates unless topped by action of the commission.

Prior Approval where rates must be approved by the commissioner before they can be used.

Flex rating, an experimental cross between the other two systems.

For Montan, because of our small market share our present system is clearly the best. Under the file and use system the Commisssioner cna address problem areas as needed. The problem with the system has been a lack of funds for auditors or actuaries to properly do the job.

Thank you.

Glen Drake

SENATE JUDICIARY
EXHIBIT NO. 3
DATE Jan. 19, 1987
BILL NO. SB 52

STANDING COMMITTEE REPORT

January 19 19 27

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration SENATE BILL No. 16

first reading copy (white color)

SB 16 Require presale notice to owner of sale to enforce agister, service lien.

Respectfully report as follows: That SENATE BILL No. 16

is amended as follows:

1. Page 2, lines 14 through 16.
Following: "sale" on line 14
Strike: the remainder of line 14 through "sale" on line 16

as amended

DO PASS

~~BE NOT PASS~~

Chairman.

STANDING COMMITTEE REPORT

January 20 19 87

MR. PRESIDENT

We, your committee on Senate Judiciary

having had under consideration SENATE BILL No. 2

first reading copy (white color)

Providing lien rights for physical theratpists and occupational therapists

Respectfully report as follows: That SENATE BILL No. 2

BE AMENDED AS FOLLOWS:

1. Title, line 6.
   Following: "PHYSICAL THERAPISTS"
   Strike: "AND"
   Insert: ","
   Following: "OCCUPATIONAL THERAPISTS"
   Insert: ", CHIROPRACTORS, AND PERSONS PRACTICING DENTISTRY"

2. Page 1, line 14.
   Following: "Therapist,"
   Insert: "Chiropractor, Dentist,"

3. Page 1, line 18.
   Following: "occupational therapists,"
   Insert: "chiropractors, persons practicing dentistry,"

4. Page 2, line 1.
   Following: "occupational therapists,"
   Insert: "chiropractors, persons practicing dentistry,"

5. Page 2, line 3.
   Following: "therapist,"
   Insert: "chiropractor, person practicing dentistry,"

6. Page 2, line 6.
   Following: "therapist,"
   Insert: "chiropractor, person practicing dentistry,"

~~DO PASS~~

~~DO NOT PASS~~

CONTINUED ON SECOND PAGE

CONTINUED

Chairman.

January 20 07
19

7. Page 2, line 18.
Following: "therapist,"
Insert: "chiropractor, person practicing dentistry,

8. Page 3, line 1.
Following: "occupational therapist,"
Insert: "chiropractor, person practicing dentistry,"

9. Page 3, line 8.
Following: "therapist,"
Insert: "chiropractor, person practicing dentistry,"

10. Page 3, line 19.
Following: "occupational therapist,"
Insert: "chiropractor, person practicing dentistry,"

11. Page 3, line 22.
Following: "therapist,"
Insert: "chiropractor, person practicing dentistry,"

12. Page 4, line 6.
Following: "therapy,"
Insert: "chiropractic, dentistry,"

AMEND/SB2P.SCR

AND AS AMENDED
DO PASS

Senator Nasurek

STANDING COMMITTEE REPORT

January 20 19 37

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration SENATE BILL No. 40

second reading copy (yellow color)

Allow crime victims program to pay for mental health treatment for dependent.

Respectfully report as follows: That SENATE BILL No. 40

is amended as follows:

1. Title, line 7.
Following: "CONDUCT OR"
Insert: "CERTAIN RELATIVES OF"

2. Title, lines 7 and 8.
Following: "CRIME" on line 7
Strike: the remainder of line 7 through "FAMILY" on line 8

3. Page 4, line 23 through line 1, page 5.
Following: "(9)(c)," on line 23
Strike: remainder of line 23 through "CHAPTER 3, OR" on line 1, page 5

4. Page 5, line 2.
Following: "OF"
Strike: "SUCH"
Following: "MINOR"
Insert: "who is a victim of a sexual crime for which a person has been charged and who is not entitled to receive services under Title 41, chapter 3,"

AS AMENDED

a DO PASS

~~DO NOT PASS~~

Chairman.

MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
50TH LEGISLATIVE SESSION

March 3, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on March 3, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present.

SENATE BILL NO. 59 - Allow Banks to Hold Agricultural Land for 10 Years Following Foreclosure, sponsored by Senator Jack Galt, Senate District 16, Martinsdale. Senator Galt explained that he represented the interim committee that studied agricultural problems. He said one of their recommendations is this bill which would allow state chartered banks to retain for ten years agricultural land that they have acquired instead of the existing law that allows them to retain it for five years. He said the main purpose of the bill would help retain the value of agricultural land. He pointed out that the value of agricultural land had fallen by 40-50 percent in the last few years. He said this bill would assist the agriculture community.

PROPONENTS

John Cadby, representing the Montana Bankers Association. Mr. Cadby distributed information supporting Senate Bill 59. He said the information tries to outline a typical scenario and applies to commercial as well as agricultural real estate. He submitted amendments to have a two year trial period. Exhibit Nos. 1 and 2.

Sharon Cleary, representing the Montana Association of Realtors. Ms. Cleary stated, for reasons outlined in previous testimony, they support this bill.

Mons Teigen, representing the Montana Stockgrowers and Cattlewomen's Organizations. Mr. Teigen submitted written testimony. Exhibit No. 3.

OPPONENTS

Terry Carmody, representing Montana Farmers Union. Mr. Carmody stated the original law was placed on the books to keep banks out of speculation. He said this law would allow them to get into speculation. He said state banks that can't move the property can ask for an extension. He pointed out that agricultural land is priced at production value and that land will not appreciate like it has in the

past. He commented the only money available for agricultural loans came from insurance companies, and insurance companies require production appraisal and will only loan at 30 percent. He said if this bill passes, he suggested an amendment that if banks are allowed to hold agricultural land longer than five years and allow them to speculate, any money they receive above the loan balance remaining against the property would revert back to the person that they foreclosed on.

Jo Brunner, representing the Water Development Association. Ms. Brunner stated she is neither opposing or supporting this bill, but is testifying with a point of information. She informed the committee that the Reclamation Act allows anybody that forecloses on land on federal irrigation projects to hold that land only five years. She said if they have more land than allowed under the reclamation act they must either pay full costs of water or not have water delivered to them.

Shirley Ball, representing Montana WIFE, spoke in opposition to the bill. She said that ten years was too long and allowed for banks to speculate. She urged the committee to oppose the bill, and said they agree with the Farmers Union amendment if the bill is passed.

Meg Nelson, representing Northern Plains Resource Council. Ms. Nelson stated this bill would allow banks to hold land values at an artificially high level. She said this would make it difficult for family farmers and ranchers to enter agriculture. She added the opportunity for extension of the five year period is available.

QUESTIONS

Rep. Simon questioned Sen. Galt on the termination date of 2001. Sen. Galt replied that it was in effect for ten years after December 31, 1991. He pointed out that this was not just foreclosed property but property given to the bank and the bill would give them ten years to dispose of it.

Rep. Wallin commented that this was permissive legislation for the banks.

Rep. Simon asked John Cadby about the proposed amendments that addressed commercial property. He asked if a subdivision would be eligible under a definition of commercial property. Mr. Cadby replied that he would have to refer to the property tax classification in the amendment that was used to define commercial land. He said it was a commercial development and a commercial loan to a developer which the bank was forced to take back.

Rep. Bachini asked Sen. Galt whether the banks already had that option. Sen. Galt replied that it would do away with the red tape. He pointed out that a lot of institutions did not like to ask for variance. He said this would supply the option for banks to keep it for ten years.

Rep. Glaser asked Fred Flanders, Commissioner of Financial Institutions, about permitting banks to hold land after five years. He asked how many times this had been requested. Fred Flanders replied that records were not kept on the number of requests. He said that if the bill was not passed they intend to establish a formal procedure for requesting extensions.

Rep. Bachini asked about the red tape in order to get an extension. Mr. Flanders said that no formal procedure had been established. He said the main objection to extension was that the financial division wants the bank to convert the asset to cash. He said it was a nonperforming asset that should be eliminated, and the intent of the bill was to preclude the dumping of a lot of real estate on the market at the same time.

Rep. Brandewie pointed out that more requests would be coming up because banks were coming up against the five year limit. Fred Flanders said they do anticipate a number of requests.

Rep. Wallin asked whether the bank examiners objected since they wanted the assets converted to cash. Fred Flanders replied that the likelihood of the bank holding property for speculation was remote.

Rep. Simon questioned the problem of depression in land values. He asked if an extension would lengthen the problem. Fred Flanders replied that it was a legitimate concern. He said the intent of the bill would allow for a more orderly disposal of real estate.

Rep. Hansen asked John Cadby about other reasons to apply for an extension. John Cadby said they were hopeful that the current commissioner of financial institutions was more receptive to the requests of banks than the previous commissioner.

CLOSING

Senator Galt made no further comments.

Chairman Kitselman referred this bill to a subcommittee to work out some of the questions raised. He appointed Reps. Glaser, Grinde, Bachini with Rep. Glaser as chairman.

SENATE BILL NO. 78 - Transfer Regulation of Passenger Tramways to Department of Commerce, sponsored by Sen. Jack Haffey, Senate District 33, Anaconda. Sen. Haffey stated the bill transfers the responsibility for regulation of tramways from the Architecture and Engineering Division of the Department of Administration to the Business Regulation Division in the Department of Commerce. He said that tramways had to be certified and inspected each year.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

Rep. Simon asked about the qualifications of the people in the Department of Commerce. Jim Kembel, with the Department of Commerce, Business Regulation Division, pointed out that the Division currently handled all enforcement of codes on elevators, electrical, plumbing, mechanical, and building codes. He said the inspection was handled under a co ract with an engineer out of Missoula. He pointed out the advantage is that of an enforcement agency dealing with regulation.

Rep. Bachini asked Jim Kembel regarding the tax assessment. Mr. Kembel noted that SB 307 changes some of the finances and addresses the issue.

SENATE BILL NO. 16 - Require Presale Notice to Owner of Sale to Enforce Agister, Service Lien, sponsored by Senator Mike Halligan, Senate District 29, Missoula. Senator Halligan stated this bill was brought to the interim committee on lien laws by Chief Justice Turnage. He said that it provides a standard notice provision that would allow a 30 day notice to a person that does not pay their bill of sale. He submitted the letter from Chief Justice Turnage. Exhibit No. 4.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

None.

CLOSING

Senator Halligan made no further comments.

SENATE BILL NO. 84 - Discretion of Law Enforcement Agency in Reserve Officers' Insurance Plan, sponsored by Senator Gene Thayer, Senate District 19, Great Falls. Senator Thayer stated this bill was at the request of the Department of Labor. He commented that in 1979 the law was amended to allow public corporations other than state agencies to ensure plan 1 and 2 rather than exclusively plan 3 of worker's compensation. He said a section of the law left out reserve officers, and this bill adds the reserve officers to that law.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

None.

CLOSING

Senator Thayer made no further comments.

SENATE BILL NO. 2 - Providing Lien Rights for Physical Therapists and Occupational Therapists, sponsored by Sen. Tom Hager, Senate District 48, Billings. Senator Hager stated that as the interim committee studied the lien laws, they found that the persons who are allowed to file liens in case of nonpayment of a bill were not equitable, in that certain people were not included. He said the interim committee recommended extension of the privilege of filing liens to include physical and occupational therapists and chiropractors. He pointed out this was a matter of omission in the law, and this bill would correct that.

PROPONENTS

Gary Lusin, physical therapist from Bozeman and president of the Montana Chapter of the American Physical Therapy Association. He said as a small business man, a legal means to recover costs is needed. He submitted written testimony. Exhibit No. 5.

Doris Luckman, co-owner and business manager for the Joe O. Luckman Physical Therapy Clinic in Great Falls. Ms. Luckman stated that people who had been seriously injured to require physical therapy services and who chose to have therapy should expect to pay for the services they receive. She said a small business has operational expenses and it is not fair to be expected to provide the service with no protection. Ms. Luckman submitted written testimony. Exhibit No. 6.

Mary Mistal, representing private practice physical therapists. Ms. Mistal stated that this bill would allow physical therapists to be added to the lien laws to help ensure payment of their services.

Kurt Hanson, physical therapist in Helena. Mr. Hanson stated that part of their clientele were ones involved in lawsuits and have experienced not being reimbursed for services as a part of a settlement of a lawsuit. He feels that the protection offered by a lien would enable reimbursement for services already rendered.

Roger Tippy, representing the Montana Dental Association. Mr. Tippy stated that a generic description of all licensed health care providers could be included in the bill to shorten the list of people allowed to file liens, and to include the dentists.

Bonnie Tippy, representing the Montana Chiropractors Association. Ms. Tippy stated the chiropractor group had similar problems that the physical therapists have with nonpayment for their services.

Mike Pardis, chiropractor in Helena. Mr. Pardis stated they support this bill as amended to include chiropractors.

Mona Jamison, representing the Montana Chapter of the American Physical Therapy Association. Ms. Jamison stated that in behalf of the Association she urges support of the bill as amended. She said this was an economic issue since all expect to be paid for their work. She said filing a lien is equitable and fair to ensure that they receive payment from insurance settlements.

OPPONENTS

None.

QUESTIONS

Rep. Driscoll asked if a person does not have insurance to file a lien against, could a lien be filed against their house. Mona Jamison replied that a lien could be filed only against the insurance proceeds. She said the focus of the lien bill is on the insurance benefits should the injured party have a recovery. She said it did not extend to their homes.

Rep. Swysgood asked if this lien was filed against the insurance settlement, was the intent that it would be assumed that everybody is not going to pay their bills. Mona Jamison replied that the lien would have to be filed after the lawsuit and before judgement was rendered in the lawsuit.

Sen. Hager said the purpose of the bill would enable the chiropractor, physical therapists, and dentists to file a lien in the same manner as physicians and nurses.

Rep. Thomas asked if a lien filed could apply to some future benefits. Mr. Tippy replied that a lien had to be dollar specific and not open ended for unknown services. Ms. Jamison responded that in the code section in the notice of the lien, it is specifically tailored as to what has to be included and described in the nature of services, when rendered, the value, and that a lien is claimed. She said it was incident specific or claim specific, and the lien has to be filed with those benefits covering a particular incident.

CLOSING

Sen. Hager made no further comments.

EXECUTIVE ACTION - March 3, 1987 - 10:10 a.m.

ACTION ON SENATE BILL NO. 2

Rep. Brandewie moved that Senate Bill No. 2 BE CONCURRED IN. The motion carried unanimously.

Rep. Bachini will carry the bill in the House.

ACTION ON SENATE BILL NO. 84

Rep. Wallin moved that Senate Bill No. 84 BE CONCURRED IN. The motion carried unanimously.

Rep. Bachini will carry the bill in the House.

ACTION ON SENATE BILL NO. 16

Rep. Hansen moved that Senate Bill 16 BE CONCURRED IN. The motion carried unanimously.

Rep. Hansen will carry this bill in the House.

ACTION ON SENATE BILL NO. 78

Rep. Pavlovich moved that Senate Bill No. 78 BE CONCURRED IN. The motion carried unanimously.

Rep. Pavlovich will carry this bill in the House.

ADJOURNMENT

The meeting was adjourned at 10:15 a.m.

Les Kitselman

REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date MARCH 3, 1987

NAME	PRESENT	ABSENT	EXCUSED
REP. LES KITSELMAN, CHAIRMAN	✓		
REP. FRED THOMAS, VICE-CHAIRMAN	✓		
REP. BOB BACHINI	✓		
REP. RAY BRANDEWIE	✓		
REP. JAN BROWN	✓		
REP. BEN COHEN	✓		
REP. JERRY DRISCOLL	✓		
REP. WILLIAM GLASER	✓		
REP. LARRY GRINDE	✓		
REP. STELLA JEAN HANSEN	✓		
REP. TOM JONES	✓		
REP. LLOYD MCCORMICK	✓		
REP. GERALD NISBET	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CLYDE SMITH	✓		
REP. CHARLES SWYSGOOD	✓		
REP. NORM WALLIN	✓		

STANDING COMMITTEE REPORT

MARCH 3 19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 84

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN Chairman

THIRD reading copy (BLUE color)

STANDING COMMITTEE REPORT

MARCH 3 19 97

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 72

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN Chairman

THIRD BLUE

_____ reading copy (_____ color)

STANDING COMMITTEE REPORT

March 3 19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 16

☐ do pass
☐ do not pass
☒ be concurred in
☐ be not concurred in
☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN Chairman

THIRD BLUE
reading copy (color)

STANDING COMMITTEE REPORT

March 3 19 37

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 2

☐ do pass
☐ do not pass

☒ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

REP. LES KITSELMAN Chairman

THIRD reading copy (BLUE color)

SB-59

EXHIBIT 1
DATE 3/3/87
SB SB 59

Mr. Chairman and Members of the Committee:

The following scenario is typical:

a) bank takes property in satisfaction of debt or purchases property at mortgage sale;

b) bank writes off and deducts from taxes difference between amount loaned and appraised value of property if appraised value below amount loaned, (e.g. bank loans $200,000 property appraised at $100,000 bank writes off and deducts $100,000);

c) bank holds property until leased or sold;

d) state law requires property written off and sold within 5 years, unless approved for extension by Commissioner of Financial Institutions, or Comptroller;

e) bank cannot deduct loss for taxes until property is sold.

For example, a bank in Hamilton has property next to a golf course in Idaho valued at $200,000. Bank is holding the property expecting the value to appreciate when golf course is developed. Bank must sell at loss due to 5 year limit.

Bank in Glendive has taken back 50 lots in subdivision left over from the oil boom. Bank will probably take a loss as there are few buyers.

Forcing a bank to sell repossessed property will depress land values further. Private individuals trying to sell homes, lots or farms in the same area will be adversely effected. Neighbor farmers will have less collateral value for operating loans. Farmers with a higher debt to asset ratio are subject to higher interest rates.

A 5 year maximum holding period restricts the bank to one or two year leases. The longer the holding period, the longer the lender is able to provide a long term lease. Farmers who have deeded their property in lieu of foreclosure may be able to lease back on a long term lease with an option to buy at the end of the lease period.

Colorado allows a 15 year holding period for banks. The Farm Credit System allows a 20 year amortization period.

Montana is in the bottom 5 states in ranking of bank profitability in the nation. In the first 9 months of 1986, earnings for all Montana banks totaled only $6.5 million (less than a 1% return on total assets) which is an 80% drop compared to the first 9 months of 1985. Of the 170 commercial banks in Montana, 51 lost money in 1986. Montana ranks 4th in the United States in non-performing loans. Further, loan activity dropped 3.5% in 1986.

A number of Montana banks are strained for capital at the present time. Forcing banks to dispose of property at today's value will aggravate the problem and may very well contribute to the closure of one or more banks.

EXHIBIT 2
DATE 3/3/87
SB SB 59

Amendents to Senate Bill 59 (Third Reading) to make the bill applicable to both agricultural and commercial real estate; to allow state chartered banks to hold agricultural and commercial real estate for seven years following acquisition, and providing that the act terminates January 1, 1990.

Amend Senate Bill 59, third reading copy, page 1 in the title, line 8, following the term "AGRICULTURAL" add the following:

"AND COMMERCIAL"

Continuing page 1, line 8, strike the numerals "10" and insert "7".

Continuing page 1, following the material on line 21, insert the following new paragraph:

"WHEREAS, foreclosure of agricultural land affects the value of commercial land because agriculture is Montana's basic industry."

And, further amend page 3, line 7, strike the figure "10" and insert "7".

Further amend page 3, line 12, following the citation of "80-12-102" and before the period insert the following material:

"or commercial land as defined in 15-1-101(1)(d)(i)"

Further amend page 3, line 21, following the word "agricultural" add the following:"

"and commercial"

Further amend page 3, line 25, strike "1991" and insert "1989."

Further amend page 4, line 4, strike "2001" and insert "1990."

EXHIBIT 3
DATE 3/3/87
SB SB 59

WITNESS STATEMENT

NAME Nels Tergen
BILL NO. SB 59
ADDRESS Box 1699 Helena
DATE 3/3/87
WHOM DO YOU REPRESENT? Mont Stockgrowers & Cattlewomen
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The Mont Stockgrowers ag credit committee has reviewed this bill and believe that - far from "speculating" this bill would make possible long term leases with sale options thus expediting the return of owner operators on the foreclosed property.

We support the measure.

EXHIBIT
DATE 3/3/87
SB 378

WITNESS STATEMENT

NAME Tom O'Connell BILL NO. SB 378

ADDRESS 1500 Florence Helena DATE 3/3/87

WHOM DO YOU REPRESENT? State of Montana DofA

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

12/86 EXHIBIT
DATE 3/3/87
SB SB 78

BILL NO. _____

TESTIMONY

TITLE:

"AN ACT TO TRANSFER REGULATION OF PASSENGER TRAMWAYS FROM THE DEPARTMENT OF ADMINISTRATION TO THE DEPARTMENT OF COMMERCE; AMENDING SECTIONS 23-2-702, 23-2-715, AND 23-2-734 MCA AND PROVIDING AN EFFECTIVE DATE".

PURPOSE:

This bill is proposed to you for the purpose of amending the law relating to the regulation of passenger tramways in the State. It would transfer the responsibility for this regulation from the Department of Administration to the Department of Commerce. The Department of Commerce has numerous regulatory functions and could more appropriately administer the program.

DESCRIPTION OF THE BILL:

Section 23-2-702, Subsection (2), is amended to define "department" as the Department of Commerce instead of the Department of Administration.

Section 23-2-715, Subsection (1), is amended to delete reference to the Department of Administration.

Section 23-2-734 is amended to delete reference to the Department of Administration.

A new section provides a July 1, 1987 effective date.

EFFECT OF THE BILL:

This bill will not change, or in any other way effect the policies and functions of the passenger tramway program. Only the administration of the program will be changed. The bill allows the tramway program to be consolidated with similar regulatory functions currently existing within the Department of Commerce.

SUMMARY:

This bill recognizes that the passenger tramway program, and the citizens of Montana that it serves, have a right to expect efficient management from government. Grouping the tramway program with similar functions such as building codes and professional and occupational licensing, provides the organization necessary for proper administration. In turn, this will insure that the public receives the best safeguards possible through the program.

EXHIBIT
DATE 3/3/87
SB 78

WITNESS STATEMENT

NAME W. JAMES KEMBEL BILL NO. 73

ADDRESS _____ DATE 3/03/87

WHOM DO YOU REPRESENT? BUSINESS REGULATION DIVISION DOC.

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

SB 16

EXHIBIT 4
DATE 3/3/87
SB SB 16

THE SUPREME COURT OF MONTANA

J. A. TURNAGE
CHIEF JUSTICE

JUSTICE BUILDING
215 NORTH SANDERS
HELENA, MONTANA 59620
TELEPHONE (406) 444-2621

August 22, 1986

Mr. Paul Verdon
Legislative Researcher
Lien Law Interim Committee
Legislative Council
Room 138 State Capitol
Helena, MT 59620

Dear Paul:

Enclosed please find a copy of an opinion in Rose v. Myers handed down by the Court on August 21, 1986.

Since the interim committee is studying lien law matters, I believe it may be of interest to them to consider this opinion and possible amendments to the code sections relating to agister's liens to address the constitutional concerns mentioned in the concurring opinion and the opinion relative to section 71-3-1203, MCA.

Since the Court was able to render a decision in this case without reaching the constitutional issue, the Court did not reach the the constitutionality of the statute in the majority opinion. However, most certainly, an issue will be raised in the future that directly requires addressing the constitutionality issue.

The agister's lien law of this state is an important part of the citizens' daily concerns.

If a lien claimant is required to hire legal counsel and resort to the courts for judicial foreclosure of such a lien, the time and cost involved would certainly be an undue burden for many small lien matters.

For example, if someone brought a television set to a repairman and the set would be worth $100 and the repairs would be $50, it is not reasonable to require several hundreds of dollars worth of attorney fees and court costs to accomplish a foreclosure when the owner didn't pay for the repairs.

One result which would be a great detriment to many low income people of the state would be that if they wanted repairs made to their televisions, automobiles and other personal property, the repair people would start demanding exorbitant, cash-in-advance deposits before services were rendered.

It would be most appreciated if you would bring this to the attention of the committee for whatever consideration they may deem appropriate in the matter.

Sincerely,

J. A. Turnage
Chief Justice

JAT:rap
Enclosure

c: Rep. John Mercer

No. 85-405

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

H. WALTER ROSE and RICHARD H. ROSE,

Plaintiffs and Appellants,

-vs-

LARRY E. MYERS and MICHAEL A. SCHAFER, Sheriff of Yellowstone County, Montana

Defendants and Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable Diane G. Barz, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Robert E. La Fountain argued, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
Harold Hanser, County Attorney, Billings, Montana
Charles A. Bradley argued, Deputy County Atty.
Larry Myers, pro se, Billings, Montana

Submitted: July 24, 1986

Decided: August 21, 1986

Filed:

Ethel M. Harrison
Clerk

107 ALR 1072

due process safeguards: affidavit of register

Mr. Chief Justice J. A. Turnage delivered the Opinion of the Court.

Appellants, H. Rose and R. Rose, brought an action in the Yellowstone County District Court seeking to declare a sheriff's sale of appellants' horses invalid as held under the agisters' lien statutes, and attempting to nullify the certificate of sale. The District Court found that the sale was valid, that the appellants were not denied their due process by the manner of the notice and sale, and that the remaining horses be returned to appellants upon their posting a $30,000 bond pending resolution of the underlying contract dispute. From this order the Roses appeal.

We affirm the District Court in this case because the appellant had actual notice of the sale.

Appellants raise the following issues on appeal:

1. Whether the sale should have been declared invalid as unconstitutional for failure to provide for notice and an opportunity to be heard prior to deprivation of property?

2. Whether the District Court erred in holding that the notice provisions were complied with in this case?

3. Whether the court erred in failing to declare that the sale was void or voidable?

4. Whether the court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that decision to justify the court's order?

This dispute arose from an oral contract entered into in April 1984. Myers agreed to care for the Roses' horses at a cost of $12 per head per month. The parties dispute whether Myers was responsible for feeding the horses or merely pasturing them. On November 30, 1984, Myers sent notice to the Roses that an agister's lien sale would take place in

December. Money was paid to Myers and the sale was not held. Over the course of the winter, Myers found it necessary to feed the horses at his own expense as the pasture would not support the horses in the winter. Myers contends the agreement was for pasturing only, while the Roses contend it was for the care and feeding of the horses.

On March 1, 1985, Myers again caused to be issued from the Yellowstone County sheriff's office, a notice of an agister's lien sale scheduled for March 11, 1985. The notice was postmarked March 1, 1985, and notices were posted in Yellowstone County. The sale was held March 11, 1985. The Roses contend they did not receive the notice until March 12, 1985. Myers stated he informed the Roses of the sale by telephone on March 2, and 3, 1985.

At the sale, 55 of 129 horses were sold for $6,830 which was then applied by the sheriff to the outstanding bill. The Roses claim the horses' value was far in excess of $6,830, but that none of the horses were sold as registered and most were sold by lots or in gross.

On March 20, 1985, the Roses filed their petition for declaratory relief, and to set aside the sale. Following a hearing before Judge Barz, the District Court held that the sale was valid and the Roses were not denied their due process. The Roses appeal that order.

Appellants' horses were sold pursuant to the agisters' lien statutes, § 71-3-1201, MCA, et seq. Section 71-3-1201, MCA, states:

> (1) If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or

ranching the stock and may retain possession thereof until the sum due is paid.

Enforcement of the lien is found at § 71-3-1203, MCA. That statute says:

> If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner:
>
> (1) He shall deliver to the sheriff or a constable of the county in which the property is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.
>
> (2) Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.
>
> (3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.
>
> (4) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.
>
> (5) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in [sic] not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

Our decision in this case is arrived at on other than constitutional grounds. We find it unnecessary to decide whether § 71-3-1203, MCA, is constitutional and therefore do not consider appellants' first issue.

The attention of the Montana Legislature is respectfully directed to the due process provisions of Article II, Section 17, of the Montana Constitution, the Fourteenth Amendment of the Constitution of the United States and their application to the notice provisions of § 71-3-1203, MCA.

The agisters' lien statute was first enacted in 1895 and is an important part of our commercial law, serving as a practical matter both the interest of debtors and creditors. If in a future case this statute was found to be unconstitutional, it would invite chaos and confusion in this area of law.

Appellants' second issue is whether the District Court erred in holding that the notice requirements were met in this case. Appellants argue that the notices of the sale were untimely and deficient, and that the District Court incorrectly interpreted the statutes in regard to notice.

The Roses claim the notice was untimely as they did not receive notice until one day after the sale. The District Court found that two notices were mailed to the Roses on March 1, 1985, 10 days before the sale. In addition, the Roses received notice in the form of two telephone calls from Myers on March 2, and 3, 1985. The District Court correctly concluded that the Roses received timely notice.

Appellants also claim the notices were deficient in that the notice failed to adequately describe the location of the sale or the property to be sold. The notice stated that the sale was to be held at "10:00 o'clock a.m. 3½ miles SW of Laurel." The notice described the property for sale as "10

mix horse colts, 25 mix mares, 17 mix colts, 1 gray stud, 1 sorrel stud, 1 chestnut stud."

The description of the horses is satisfactory. The notice described the horses by number, sex, and color. Appellants' contention that the notice should have described what mix the horses were as well as any special breeding or other special characteristics of the horses is not correct. The notice description was sufficient to alert the public to the nature of the sale and the property to be sold. There is no need for the kind of detailed description advocated by the appellants.

Further, appellants failed to raise the issue of the adequacy of the sale location description during the trial below. Since appellants failed to raise the issue below, we will not address the question on appeal.

The Roses also argue that the District Court incorrectly interpreted the statutes in regard to notice. Section 71-3-1203(3), MCA, states:

> Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.

The District Court concluded that the notice "must be reasonably calculated to reach the owners of the livestock." We agree with the District Court's conclusion that the method of notice was reasonable, and that the Roses received notice of the sale.

Appellants' third issue is whether the District Court erred in failing to declare the sale void or voidable. Both sides agree that for a sale to be valid, the seller, acting in good faith, must substantially comply with the notice requirements of the power of sale, and the resultant sale

must be a fair one. As discussed above, the notice requirements were substantially complied with in this case. Further, we hold that the resultant sale was fair.

The District Court applied the standard of commercial reasonableness to judge the sale. Appellants argue that the sale was not commercially reasonable because the horses were sold in lots for far less than their value. The District Court answered that:

> The Plaintiffs have not presented any evidence that this [sale in lots] is not reasonable. Deputy Sheriff Schmaing, on the other hand, testified that he has conducted thousands of sales and that he often sells horses in this manner. Further, he testified that he was willing to sell the horses individually should any bidder so request. This method was not commercially unreasonable.

Although this sale is not governed by the Uniform Commercial Code, that Code's discussion of commercial reasonableness is helpful. Section 30-9-507(2), MCA, states:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . .

The above authority supports the District Court's decision. Although the appellants claim the horses were worth far more than the selling price, that alone is insufficient to render the sale unreasonable. Likewise, the fact that the horses were sold by a method different from that suggested by appellants (in lots as opposed to individually)

does not render the sale unreasonable. The District Court correctly decided that the sale was commercially reasonable, and we will not reverse the District Court's decision.

The final issue raised by appellants is whether the District Court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that holding to justify the court's order.

In its memorandum in support of its order, the District Court stated:

> Before turning to the law regarding the sale, the Court takes notice of two factors. The Court takes judicial notice that the sum of $12 per head per month cannot possibly include the cost of providing extra feed for the horses. The Court further notes that the Plaintiffs have shown knowledge of this fact by making $7,000 payment to the Defendant prior to March, 1985. (114 head x $12 per month x 8 months = $1,824)
>
> The Court takes note of this, not to rule on the merits of the contract dispute, but rather as a factor in the notice Plaintiffs had regarding the sale.

Appellants argue that the District Court erroneously substituted its judgment for that of the parties who agreed on a contract price knowing the horses were to remain with Myers for an indefinite period of time. The court calculated 114 head x $12 per head x 8 months equals $1,824. Since the Roses paid Myers $7,000 between December, 1984, and February, 1985, the court inferred that the Roses recognized that they owed more than $12 per head per month, and that the excess would be applied to pay for feed over and above the original contract amount. This is wrong.

The correct calculations are: 114 head x $12 per head x 8 months equals $10,944, not $1,824. Thus, appellants argue, the $7,000 payment was a partial payment on the

$10,944, the balance to be paid when the horses were retrieved. The court drew inferences from incorrect figures and erred in applying those inferences to justify its decision.

Further, appellants argue the court took judicial notice of facts not properly subject to judicial notice.

Appellants are correct when they say the court incorrectly calculated the bill and took judicial notice of a fact not appropriate for judicial notice. Rule 201, M.R.Evid. states:

> (b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

However, the error is harmless as there is ample evidence to support the District Court's conclusion. On cross-examination, the appellant Richard Rose, testified as follows:

> Q. Mr. Rose, I believe you stated that the agreement you had with Mr. Myers was that you were to pay him $12.00 per month per horse unit; is that correct? A. That is correct.
>
> Q. Now that was only for pasture; wasn't it? That didn't include feed? A. That is correct.
>
> Q. And if he had to feed them, that would be an additional charge; wouldn't it? A. Yes.
>
> Q. And it doesn't include any labor on his part, either; does it? A. No.

Thus, even without the court's calculations there is ample evidence that the appellants owed Myers more than $10,944 and only paid $7,000. The court took judicial notice that appellants knew they owed Myers for feed and labor costs because they paid Myers in excess of $12 per head per month. The

court's calculations were wrong, but the result is the same. Appellants' own testimony revealed that the Roses knew they owed Myers for feed and labor costs in excess of the contract price, so although the court improperly took judicial notice of the fact, the result is supported by the evidence. Therefore, it is not necessary to reverse the District Court on this issue.

The order of the District Court is affirmed in all respects.

J. A. Turnage
Chief Justice

We concur:

John Conway Harrison

John C. Sheehy

K. C. Sullivan

Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur in the result reached by the majority, but cannot agree with its analysis of the constitutional challenge raised by appellants.

The majority reaches its decision without addressing appellant's claim that § 71-3-1203, MCA, is unconstitutional as violative of due process. Appellants first raised the issue in their initial complaint before the District Court. They gave notice to this Court of the constitutional challenge in compliance with Rule 38 M.R.App.Civ.P.. Appellants have standing to challenge the statute. I cannot agree with the majority opinion that it is unnecessary to decide whether § 71-3-1203, MCA, is constitutional. The issue is squarely before us and cannot be ignored.

I would hold that § 71-3-1203, MCA, is clearly unconstitutional. The statute violates the due process clauses of the state and federal constitutions. However, I concur in the affirmance of the District Court's decision because the appellants have already had their hearing. Following the sale, the appellants brought an action in the District Court which they litigated to a final judgment, and from which they now appeal. They received the full benefits of a trial in which they had an opportunity to fully present their case. The District Court found in favor of the respondents. Therefore, it is unnecessary to reverse the District Court and remand this case for a hearing.

The agister's lien statute is clearly unconstitutional, however, because there is significant state action involved, and because the statute provides neither notice nor an opportunity to be heard prior to deprivation of property.

First, it is clear there is significant state action involved. The Third Circuit Court of Appeals found state action from the mere enactment of a statute authorizing a garageman to sell a customer's vehicle for nonpayment of a bill. Parks v. Mr. Ford (3d Cir. 1977), 566 F.2d 132. The state action under § 71-3-1203, MCA, is far more significant. The sheriff is given a copy of the bill, a description of the property, and the name of the owner. The sheriff then must advertise and conduct the sale, he applies the proceeds of the sale to the debt, and provides the buyer with a bill of sale. Clearly this constitutes significant state action.

Second, the statute does not satisfy the minimum due process requirements elaborated by either the Montana or the United States Supreme Court. As this Court stated in Nygard v. Hillstead and Coyle (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645:

> It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, § 17. "'It is well settled that notice and opportunity to be heard are essential elements of Due Process.'" Halldorson v. Halldorson (1977), 175 Mont. 170, 573 P.2d 169, 171.

The United States Supreme Court has addressed the due process requirement in the area of garnishment, replevin, and sequestration. That line of cases includes Sniadach v. Family Finance Corp. (1983), 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; Fuentes v. Shevin (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; Mitchell v. W.T. Grant Co. (1974), 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, and North Georgia Finishing Co. v. Di-Chem, Inc. (1975), 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751.

In Sniadach, it was held that the Wisconsin prejudgment garnishment procedure whereby the defendant's wages were

frozen in the interim between the garnishment and the culmination of the main suit, without the opportunity for a hearing, violated the Fourteenth Amendment. The Court noted that wages were a specialized type of property and prejudgment garnishment might impose tremendous hardship on wage earners. The Sniadach holding was expanded by Fuentes. In Fuentes, Florida and Pennsylvania statutes were held unconstitutional. Those statutes authorized the issuance of writs ordering state agents to seize a person's possessions upon the ex parte application of any other person who claimed a right to them and posted a security bond, without providing the possessor with notice or an opportunity to be heard. The Court held that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner, and that the replevin statutes in question were constitutionally defective in failing to provide for notice and hearing. The Court noted that "extraordinary situations" may justify the lack of notice and hearing, but such a situation did not exist in that case.

Fuentes was distinguished by Mitchell wherein it was held that a Louisiana statute which permitted the seller of goods under an installment contract to obtain a writ of sequestration to recover the goods, upon buyer's default, and without notice or hearing, did not violate due process. There were other adequate safeguards of due process because the writ would issue only upon a verified affidavit, and upon a judge's authority after the creditor had filed a sufficient bond. The statute entitled the debtor to immediately seek dissolution of the writ unless the creditor proved the grounds upon which the writ issued, and the debtor could regain possession by posting a bond to protect the seller.

The final case is North Georgia Finishing, Inc.. That case relied upon Fuentes to determine that Georgia statutes authorizing garnishment of property other than wages in pending suits, but not providing for notice, hearing, or participation by a judicial officer, violated due process.

The above cases dealt with something less than a sale of the property, i.e., sequestration, replevin, and garnishment. Clearly a permanent deprivation of property, such as occurs in a sale, warrants just as stringent a due process analysis as lesser forms of deprivation. As those cases indicate, due process requires at a minimum both notice and an opportunity to be heard prior to deprivation of property absent extraordinary circumstances, or other sufficient safeguards of due process.

Section 71-3-1203, MCA, does not provide the kind of safeguards which salvaged the Louisiana statute in Mitchell. There is no requirement for a verified affidavit, no participation by a judge, no mandatory bond, and no procedure to seek an immediate halt of the sale. Further, there are no other legal remedies available to sufficiently guarantee due process. The legal procedures available to the owner, such as the institution of an action for conversion or for declaratory relief, are insufficient substitutes for a pre-sale hearing. There is little probability that trial of a contested lien claim can be held within the minimum period preceeding transfer to the buyer, and injunctions or other extraordinary remedies are discretionary with the trial court and thus lack the certainty necessary to insure a hearing prior to permanent deprivation.

The question then becomes whether there exists any extraordinary circumstances which would justify the lack of a

hearing prior to the sale. The respondent, Schafer, argues that because the personalty involved was live animals, this constitutes an extraordinary circumstance. This argument is not persuasive. The United States Supreme Court in Fuentes discussed what is meant by "extraordinary situations." As that Court said:

> These situations, however, must be truly unusual . . . .. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 90-91.

Thus, the Court has allowed summary seizure to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, or to protect the public from misbranded drugs and contaminated food. The present situation does not qualify as an important governmental interest. It is a private dispute between two parties. State intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health, and is of insufficient importance to override the due process requirements of notice and hearing. Therefore, I would hold that § 71-3-1203, MCA, is violative of due process as there is no provision for notice and hearing prior to deprivation of property.

The question remains what kind of notice and hearing satisfy due process requirements? The Supreme Court in Fuentes stated that notice must be granted at a meaningful time and in a meaningful manner. Fuentes, 407 U.S. at 80.

Further, the Court noted that leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the seizure has little probability of succeeding on the merits. Sniadach, 395 U.S. at 343.

The hearing should establish the validity, or at least the probable validity, of the underlying claim before an alleged debtor can be deprived of his property. Consideration should be given to the interests of the parties including the basis of the underlying claim, the nature of the property involved, i.e., its value, uniqueness, etc., and the need for prompt action. The hearing need not be a full blown trial-type hearing, but must protect a property owner's use and possession of property from arbitrary encroachment. This is an especially relevant danger where the State seizes and sells goods merely upon the application of a private party.

Because the appellants have properly challenged the constitutionality of § 71-3-1203, MCA, the issue must be addressed. However, I concur in the result reached by the majority and would affirm the District Court in all respects.

I concur.

William E. Hunt Sr.
Justice

No. 85-405

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

H. WALTER ROSE and RICHARD H. ROSE,

Plaintiffs and Appellants,

-vs-

LARRY E. MYERS and MICHAEL A. SCHAFER, Sheriff of Yellowstone County, Montana

Defendants and Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable Diane G. Barz, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Robert E. La Fountain argued, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
Harold Hanser, County Attorney, Billings, Montana
Charles A. Bradley argued, Deputy County Atty.
Larry Myers, pro se, Billings, Montana

Submitted: July 24, 1986

Decided: August 21, 1986

Filed:

Ethel M. Harrison

Clerk

107 ALR 1072

due process safeguards: affidavit of register

Mr. Chief Justice J. A. Turnage delivered the Opinion of the Court.

Appellants, H. Rose and R. Rose, brought an action in the Yellowstone County District Court seeking to declare a sheriff's sale of appellants' horses invalid as held under the agisters' lien statutes, and attempting to nullify the certificate of sale. The District Court found that the sale was valid, that the appellants were not denied their due process by the manner of the notice and sale, and that the remaining horses be returned to appellants upon their posting a $30,000 bond pending resolution of the underlying contract dispute. From this order the Roses appeal.

We affirm the District Court in this case because the appellant had actual notice of the sale.

Appellants raise the following issues on appeal:

1. Whether the sale should have been declared invalid as unconstitutional for failure to provide for notice and an opportunity to be heard prior to deprivation of property?

2. Whether the District Court erred in holding that the notice provisions were complied with in this case?

3. Whether the court erred in failing to declare that the sale was void or voidable?

4. Whether the court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that decision to justify the court's order?

This dispute arose from an oral contract entered into in April 1984. Myers agreed to care for the Roses' horses at a cost of $12 per head per month. The parties dispute whether Myers was responsible for feeding the horses or merely pasturing them. On November 30, 1984, Myers sent notice to the Roses that an agister's lien sale would take place in

December. Money was paid to Myers and the sale was not held. Over the course of the winter, Myers found it necessary to feed the horses at his own expense as the pasture would not support the horses in the winter. Myers contends the agreement was for pasturing only, while the Roses contend it was for the care and feeding of the horses.

On March 1, 1985, Myers again caused to be issued from the Yellowstone County sheriff's office, a notice of an agister's lien sale scheduled for March 11, 1985. The notice was postmarked March 1, 1985, and notices were posted in Yellowstone County. The sale was held March 11, 1985. The Roses contend they did not receive the notice until March 12, 1985. Myers stated he informed the Roses of the sale by telephone on March 2, and 3, 1985.

At the sale, 55 of 129 horses were sold for $6,830 which was then applied by the sheriff to the outstanding bill. The Roses claim the horses' value was far in excess of $6,830, but that none of the horses were sold as registered and most were sold by lots or in gross.

On March 20, 1985, the Roses filed their petition for declaratory relief, and to set aside the sale. Following a hearing before Judge Barz, the District Court held that the sale was valid and the Roses were not denied their due process. The Roses appeal that order.

Appellants' horses were sold pursuant to the agisters' lien statutes, § 71-3-1201, MCA, et seq. Section 71-3-1201, MCA, states:

> (1) If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or

> ranching the stock and may retain possession thereof until the sum due is paid.

Enforcement of the lien is found at § 71-3-1203, MCA. That statute says:

> If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner:
>
> (1) He shall deliver to the sheriff or a constable of the county in which the property is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.
>
> (2) Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.
>
> (3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.
>
> (4) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.
>
> (5) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in [sic] not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

Our decision in this case is arrived at on other than constitutional grounds. We find it unnecessary to decide whether § 71-3-1203, MCA, is constitutional and therefore do not consider appellants' first issue.

The attention of the Montana Legislature is respectfully directed to the due process provisions of Article II, Section 17, of the Montana Constitution, the Fourteenth Amendment of the Constitution of the United States and their application to the notice provisions of § 71-3-1203, MCA.

The agisters' lien statute was first enacted in 1895 and is an important part of our commercial law, serving as a practical matter both the interest of debtors and creditors. If in a future case this statute was found to be unconstitutional, it would invite chaos and confusion in this area of law.

Appellants' second issue is whether the District Court erred in holding that the notice requirements were met in this case. Appellants argue that the notices of the sale were untimely and deficient, and that the District Court incorrectly interpreted the statutes in regard to notice.

The Roses claim the notice was untimely as they did not receive notice until one day after the sale. The District Court found that two notices were mailed to the Roses on March 1, 1985, 10 days before the sale. In addition, the Roses received notice in the form of two telephone calls from Myers on March 2, and 3, 1985. The District Court correctly concluded that the Roses received timely notice.

Appellants also claim the notices were deficient in that the notice failed to adequately describe the location of the sale or the property to be sold. The notice stated that the sale was to be held at "10:00 o'clock a.m. 3½ miles SW of Laurel." The notice described the property for sale as "10

mix horse colts, 25 mix mares, 17 mix colts, 1 gray stud, 1 sorrel stud, 1 chestnut stud."

The description of the horses is satisfactory. The notice described the horses by number, sex, and color. Appellants' contention that the notice should have described what mix the horses were as well as any special breeding or other special characteristics of the horses is not correct. The notice description was sufficient to alert the public to the nature of the sale and the property to be sold. There is no need for the kind of detailed description advocated by the appellants.

Further, appellants failed to raise the issue of the adequacy of the sale location description during the trial below. Since appellants failed to raise the issue below, we will not address the question on appeal.

The Roses also argue that the District Court incorrectly interpreted the statutes in regard to notice. Section 71-3-1203(3), MCA, states:

> Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.

The District Court concluded that the notice "must be reasonably calculated to reach the owners of the livestock." We agree with the District Court's conclusion that the method of notice was reasonable, and that the Roses received notice of the sale.

Appellants' third issue is whether the District Court erred in failing to declare the sale void or voidable. Both sides agree that for a sale to be valid, the seller, acting in good faith, must substantially comply with the notice requirements of the power of sale, and the resultant sale

must be a fair one. As discussed above, the notice requirements were substantially complied with in this case. Further, we hold that the resultant sale was fair.

The District Court applied the standard of commercial reasonableness to judge the sale. Appellants argue that the sale was not commercially reasonable because the horses were sold in lots for far less than their value. The District Court answered that:

> The Plaintiffs have not presented any evidence that this [sale in lots] is not reasonable. Deputy Sheriff Schmaing, on the other hand, testified that he has conducted thousands of sales and that he often sells horses in this manner. Further, he testified that he was willing to sell the horses individually should any bidder so request. This method was not commercially unreasonable.

Although this sale is not governed by the Uniform Commercial Code, that Code's discussion of commercial reasonableness is helpful. Section 30-9-507(2), MCA, states:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . .

The above authority supports the District Court's decision. Although the appellants claim the horses were worth far more than the selling price, that alone is insufficient to render the sale unreasonable. Likewise, the fact that the horses were sold by a method different from that suggested by appellants (in lots as opposed to individually)

does not render the sale unreasonable. The District Court correctly decided that the sale was commercially reasonable, and we will not reverse the District Court's decision.

The final issue raised by appellants is whether the District Court erred in using faulty figures in taking judicial notice that the parties' contract price was too low to include feeding, and in applying that holding to justify the court's order.

In its memorandum in support of its order, the District Court stated:

> Before turning to the law regarding the sale, the Court takes notice of two factors. The Court takes judicial notice that the sum of $12 per head per month cannot possibly include the cost of providing extra feed for the horses. The Court further notes that the Plaintiffs have shown knowledge of this fact by making $7,000 payment to the Defendant prior to March, 1985. (114 head x $12 per month x 8 months = $1,824)
>
> The Court takes note of this, not to rule on the merits of the contract dispute, but rather as a factor in the notice Plaintiffs had regarding the sale.

Appellants argue that the District Court erroneously substituted its judgment for that of the parties who agreed on a contract price knowing the horses were to remain with Myers for an indefinite period of time. The court calculated 114 head x $12 per head x 8 months equals $1,824. Since the Roses paid Myers $7,000 between December, 1984, and February, 1985, the court inferred that the Roses recognized that they owed more than $12 per head per month, and that the excess would be applied to pay for feed over and above the original contract amount. This is wrong.

The correct calculations are: 114 head x $12 per head x 8 months equals $10,944, not $1,824. Thus, appellants argue, the $7,000 payment was a partial payment on the

$10,944, the balance to be paid when the horses were retrieved. The court drew inferences from incorrect figures and erred in applying those inferences to justify its decision.

Further, appellants argue the court took judicial notice of facts not properly subject to judicial notice.

Appellants are correct when they say the court incorrectly calculated the bill and took judicial notice of a fact not appropriate for judicial notice. Rule 201, M.R.Evid. states:

> (b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

However, the error is harmless as there is ample evidence to support the District Court's conclusion. On cross-examination, the appellant Richard Rose, testified as follows:

> Q. Mr. Rose, I believe you stated that the agreement you had with Mr. Myers was that you were to pay him $12.00 per month per horse unit; is that correct? A. That is correct.
>
> Q. Now that was only for pasture; wasn't it? That didn't include feed? A. That is correct.
>
> Q. And if he had to feed them, that would be an additional charge; wouldn't it? A. Yes.
>
> Q. And it doesn't include any labor on his part, either; does it? A. No.

Thus, even without the court's calculations there is ample evidence that the appellants owed Myers more than $10,944 and only paid $7,000. The court took judicial notice that appellants knew they owed Myers for feed and labor costs because they paid Myers in excess of $12 per head per month. The

court's calculations were wrong, but the result is the same. Appellants' own testimony revealed that the Roses knew they owed Myers for feed and labor costs in excess of the contract price, so although the court improperly took judicial notice of the fact, the result is supported by the evidence. Therefore, it is not necessary to reverse the District Court on this issue.

The order of the District Court is affirmed in all respects.

J. A. Turnage
Chief Justice

We concur:

John Conway Harrison

John C. Sheehy

K. C. Daubrandson

Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur in the result reached by the majority, but cannot agree with its analysis of the constitutional challenge raised by appellants.

The majority reaches its decision without addressing appellant's claim that § 71-3-1203, MCA, is unconstitutional as violative of due process. Appellants first raised the issue in their initial complaint before the District Court. They gave notice to this Court of the constitutional challenge in compliance with Rule 38 M.R.App.Civ.P.. Appellants have standing to challenge the statute. I cannot agree with the majority opinion that it is unnecessary to decide whether § 71-3-1203, MCA, is constitutional. The issue is squarely before us and cannot be ignored.

I would hold that § 71-3-1203, MCA, is clearly unconstitutional. The statute violates the due process clauses of the state and federal constitutions. However, I concur in the affirmance of the District Court's decision because the appellants have already had their hearing. Following the sale, the appellants brought an action in the District Court which they litigated to a final judgment, and from which they now appeal. They received the full benefits of a trial in which they had an opportunity to fully present their case. The District Court found in favor of the respondents. Therefore, it is unnecessary to reverse the District Court and remand this case for a hearing.

The agister's lien statute is clearly unconstitutional, however, because there is significant state action involved, and because the statute provides neither notice nor an opportunity to be heard prior to deprivation of property.

First, it is clear there is significant state action involved. The Third Circuit Court of Appeals found state action from the mere enactment of a statute authorizing a garageman to sell a customer's vehicle for nonpayment of a bill. Parks v. Mr. Ford (3d Cir. 1977), 566 F.2d 132. The state action under § 71-3-1203, MCA, is far more significant. The sheriff is given a copy of the bill, a description of the property, and the name of the owner. The sheriff then must advertise and conduct the sale, he applies the proceeds of the sale to the debt, and provides the buyer with a bill of sale. Clearly this constitutes significant state action.

Second, the statute does not satisfy the minimum due process requirements elaborated by either the Montana or the United States Supreme Court. As this Court stated in Nygard v. Hillstead and Coyle (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645:

> It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, § 17. "'It is well settled that notice and opportunity to be heard are essential elements of Due Process.'" Halldorson v. Halldorson (1977), 175 Mont. 170, 573 P.2d 169, 171.

The United States Supreme Court has addressed the due process requirement in the area of garnishment, replevin, and sequestration. That line of cases includes Sniadach v. Family Finance Corp. (1983), 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; Fuentes v. Shevin (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; Mitchell v. W.T. Grant Co. (1974), 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, and North Georgia Finishing Co. v. Dichem, Inc. (1975), 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751.

In Sniadach, it was held that the Wisconsin prejudgment garnishment procedure whereby the defendant's wages were

frozen in the interim between the garnishment and the culmination of the main suit, without the opportunity for a hearing, violated the Fourteenth Amendment. The Court noted that wages were a specialized type of property and prejudgment garnishment might impose tremendous hardship on wage earners. The Sniadach holding was expanded by Fuentes. In Fuentes, Florida and Pennsylvania statutes were held unconstitutional. Those statutes authorized the issuance of writs ordering state agents to seize a person's possessions upon the ex parte application of any other person who claimed a right to them and posted a security bond, without providing the possessor with notice or an opportunity to be heard. The Court held that a person whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner, and that the replevin statutes in question were constitutionally defective in failing to provide for notice and hearing. The Court noted that "extraordinary situations" may justify the lack of notice and hearing, but such a situation did not exist in that case.

Fuentes was distinguished by Mitchell wherein it was held that a Louisiana statute which permitted the seller of goods under an installment contract to obtain a writ of sequestration to recover the goods, upon buyer's default, and without notice or hearing, did not violate due process. There were other adequate safeguards of due process because the writ would issue only upon a verified affidavit, and upon a judge's authority after the creditor had filed a sufficient bond. The statute entitled the debtor to immediately seek dissolution of the writ unless the creditor proved the grounds upon which the writ issued, and the debtor could regain possession by posting a bond to protect the seller.

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The above cases dealt with something less than a sale of the property, i.e., sequestration, replevin, and garnishment. Clearly a permanent deprivation of property, such as occurs in a sale, warrants just as stringent a due process analysis as lesser forms of deprivation. As those cases indicate, due process requires at a minimum both notice and an opportunity to be heard prior to deprivation of property absent extraordinary circumstances, or other sufficient safeguards of due process.

Section 71-3-1203, MCA, does not provide the kind of safeguards which salvaged the Louisiana statute in Mitchell. There is no requirement for a verified affidavit, no participation by a judge, no mandatory bond, and no procedure to seek an immediate halt of the sale. Further, there are no other legal remedies available to sufficiently guarantee due process. The legal procedures available to the owner, such as the institution of an action for conversion or for declaratory relief, are insufficient substitutes for a pre-sale hearing. There is little probability that trial of a contested lien claim can be held within the minimum period preceeding transfer to the buyer, and injunctions or other extraordinary remedies are discretionary with the trial court and thus lack the certainty necessary to insure a hearing prior to permanent deprivation.

The question then becomes whether there exists any extraordinary circumstances which would justify the lack of a

hearing prior to the sale. The respondent, Schafer, argues that because the personalty involved was live animals, this constitutes an extraordinary circumstance. This argument is not persuasive. The United States Supreme Court in Fuentes discussed what is meant by "extraordinary situations." As that Court said:

> These situations, however, must be truly unusual . . .. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 90-91.

Thus, the Court has allowed summary seizure to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, or to protect the public from misbranded drugs and contaminated food. The present situation does not qualify as an important governmental interest. It is a private dispute between two parties. State intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health, and is of insufficient importance to override the due process requirements of notice and hearing. Therefore, I would hold that § 71-3-1203, MCA, is violative of due process as there is no provision for notice and hearing prior to deprivation of property.

The question remains what kind of notice and hearing satisfy due process requirements? The Supreme Court in Fuentes stated that notice must be granted at a meaningful time and in a meaningful manner. Fuentes, 407 U.S. at 80.

Further, the Court noted that leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the seizure has little probability of succeeding on the merits. Sniadach, 395 U.S. at 343.

The hearing should establish the validity, or at least the probable validity, of the underlying claim before an alleged debtor can be deprived of his property. Consideration should be given to the interests of the parties including the basis of the underlying claim, the nature of the property involved, i.e., its value, uniqueness, etc., and the need for prompt action. The hearing need not be a full blown trial-type hearing, but must protect a property owner's use and possession of property from arbitrary encroachment. This is an especially relevant danger where the State seizes and sells goods merely upon the application of a private party.

Because the appellants have properly challenged the constitutionality of § 71-3-1203, MCA, the issue must be addressed. However, I concur in the result reached by the majority and would affirm the District Court in all respects.

I concur.

William E. Hunt Sr.
Justice

EXHIBIT 5
DATE 3/3/87
SB SB 2

BOZEMAN
PHYSICAL THERAPY CENTER
Suite 703G • Medical Arts Center
300 North Willson
Bozeman, Montana 59715
(406) 587-4501

March 3, 1987

To: House Business and Labor Committee

Re: SB 2, An Act Establishing Lein Rights for Physical Therapists and Occupational Therapists.

I am a Physical Therapist from Bozeman, Montana, and have been in practice for over five years. Confronted with the demands of a small business , one of which is the endless job of collecting reimbursement for our services, requires as many legal options as possible to assure cash flow and meet our obligations. Often our reimbursement comes long after service has been provided and terminated.

Typically we see many patients involved in accidents that may or may not result in litigation on the part of the patient to recover some reward for them. This process can take three years or more and during this time we are not reimbursed. In the past five years we have accumulated over $5,000 of service provided that is in the 2-4 year wait. There is also a substantial amount in the same situation that is less than two years old. Also, in the last five years we have had 2 accounts that had been settled without us receiving our money. There has also been several situations where patients have been provided service, submitted their bills to their insurance, received reimbursement, and not bothered to pay us.

The ability to apply a legal lein in these cases would at least assure us ~~that~~ we will be able to recover our service cost with a much greater degree of certainty. It would certainly place us in the same situation as hospitals and physicians for reimbursement as we are already in the mainstream of health care and should be allowed the same avenues of collection as the other providers.

I urge your support for this bill.

Sincerely,

Gary Lusin, PT

Gary Lusin, PT

Gary Lusin, P.T.
Mary Jo Lusin, P.T.

PHONE 761-0471

JOE O. LUCKMAN, P.T.
PHYSICAL THERAPY CONSULTANT
Great Falls Medical Building
1220 Central Avenue
GREAT FALLS, MONTANA 59401

EXHIBIT 6
DATE 3/3/87
SB SB 2

March 2, 1987

TO THE CHAIRMAN AND MEMBERS OF THE HOUSE BUSINESS AND LABOR COMMITTEE:

I am Doris Luckman, co-owner and Business Manager of Joe O. Luckman, P.T., a private practice Physical Therapy office in Great Falls, Montana.

I am here today to ask for your support of Senate Bill 2, entitled "An Act Establishing Lien Rights for Physical Therapists and Occupational Therapists".

We feel that people who have been injured seriously enough to need our services and who choose to come to us should expect to pay for the services they ask for and receive.

We are a small business that has operational expenses and it is not fair to be expected to provide service with no protection. We believe that when someone does get a settlement it is only fair for us to be assured of payment for the service they received from us.

At the present time we have approximately twelve patients whose cases have been under litigation for up to three years, during which time we have received no remuneration for treatments given.

We have also had patients who have received settlements which included our balances and have chosen not to pay our bill or to only partially pay it.

Therefore, we feel the need for a legal structure to enable us to file a lien in order to collect outstanding bills when settlements are awarded.

Thank you for your time, attention and consideration of this matter.

Doris Luckman

Doris Luckman

EXHIBIT
DATE 3/3/21
SB SB 2

WITNESS STATEMENT

NAME _____ BILL NO. _____

ADDRESS _____ DATE _____

WHOM DO YOU REPRESENT? _____

SUPPORT _____ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

EXHIBIT_____
DATE_____
HB_____

WITNESS STATEMENT

NAME KIRK HANSON BILL NO. 2

ADDRESS 1027 HAUSER BLVD HELENA DATE 3/3/97

WHOM DO YOU REPRESENT? SELF

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I PRACTICE HERE IN HELENA.

WE ARE IN SUPPORT OF SB 2

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 78 DATE MARCH 3, 1987

SPONSOR SENATOR JACK HAFFEY

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
		✓	
		✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 59 DATE MARCH 3, 1987

SPONSOR SENATOR JACK E. GALT

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Shirley Ball	W I F E		✓
Tom Tully	NPRC member		✓
		✓	
			✓
			✓
		✓	
Mary Nilsen	NPRC		✓

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. Senate Bill No. 2 DATE March 3, 1987

SPONSOR Senator Tom Hager

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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